TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]52

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 27, 1918.

(26,727)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 641.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, APPELLANT,

vs.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1918.

1 I. *Original Petition.*

Filed August 18, 1913.

In the Court of Claims of the United States.

No. 32573.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

vs.

THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Missouri, Kansas & Texas Railway Company, respectfully represents:

I.

That petitioner is a corporation duly organized and existing under the laws of the State of Kansas and owns and operates, and at the times hereinafter stated did own and operate a line of railway extending from Hannibal and St. Louis, Mo., on the north, to the northern boundary of Texas, in the vicinity of Denison, Texas, on the south, and owns and operates also branch lines and ex-
2 tensions from said main line, over which said line and branches petitioner is now, and at all times hereinafter stated was, transporting the United States mails.

II.

That for many years petitioner has transported the United States mails over its road between Kansas City, Mo., and Oklahoma-Texas boundary line near Denison, Texas; Parsons, Kan., and Oklahoma City, Okla., and Sedalia, Mo., and Parsons, Kan., which said portions of its road have been and still are designated by the Post-Office Department as mail routes numbers 153010, 153016, and 155098, respectively.

III.

That by the act of Congress approved March 3, 1873 (17 Stat., 558), making appropriation for the expenses of the Post-Office Department for the fiscal year ending June 30, 1874, the Postmaster General was authorized and directed to readjust the "compensation

for the transportation of mails on railroad routes" on the basis of the average daily weight of mails carried thereover. In regard to the ascertainment of such average daily weight, said act provided:

"* * * the average weight to be ascertained in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

That the above-quoted provision of the act of March 3, 1873, with respect to the ascertainment of the average daily weight of mails carried, remained in effect until the passage by Congress of the act approved March 3, 1905 (33 Stat., 1082, 1088), making appro-

3 priations for the expenses of the Post-Office Department for the fiscal year ending June thirtieth, nineteen hundred and six, wherein it was provided:

"That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Under the said acts of March 3, 1873, and March 3, 1905, the Post-Office Department has customarily adjusted the compensation of the mail-carrying railroads, including your petitioner, once in every four years, and in making such adjustments, at all times prior to July 1, 1912, always weighed all of the mails carried on the routes of such railroads.

That during said period from March 3, 1873, to July 1, 1912, it sometimes happened that mails were diverted from one route to another during a quadrennial period, so that the compensation fixed by the previous quadrennial adjustment no longer accurately represented the service actually performed, but that in all such cases no readjustments of compensation were made except upon a weighing of all the mails carried on the routes concerned as required by said acts of March 3, 1873, and March 3, 1905, and in conformity with the provisions thereof; that in such cases readjustments were not made at any time prior to July 1, 1912, upon a weighing of the diverted mails only.

IV.

That each year from the year 1907 down to and including the year 1911 the Postmaster General informed Congress of this condition and recommended remedial legislation. In his report for the fiscal year ending June 30, 1907, said officer stated as follows (p. 25):

4 "Under the law and the present practice compensation for railroad transportation in any one section is not readjusted oftener than once in every four years upon a general weighing of the

mails. General weighings of the mails are expensive, and it has been thought inadvisable to order them more frequently. Neither has it been deemed advantageous to authorize weighings upon routes during a quadrennial term. As a result, when mails are diverted from one route to another during the term, payments continue to be made to railroad companies for the remainder of the term for weights which they have ceased to carry, and there is no existing practice by which the railroad companies carrying such diverted mails may be compensated therefor.

"There should be some practicable and equitable method of readjusting pay in such instances. This could be accomplished best by ascertaining the effect of such diversions by taking the weights of the mails diverted, computing their daily average, and revising accordingly the average daily weights of the routes affected. In such a computation due allowance should be made for the increase in weight of mails subsequent to the general weighing, as it would not be just to subtract this increase from the weight carried by the one company or to credit it to that carried by the other.

"There is a question, however, as to whether the Postmaster General has sufficient authority under existing law to make readjustments in such cases without a new weighing of all the mails carried over the routes affected. In order to remove doubt and to provide a suitable method for such readjustments, I recommend the following legislation by Congress:

"When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of the mails so diverted for such number of successive working days, as he may determine and have the weights stated and verified to him as in other cases, and readjust the compensation upon the routes affected accordingly; Provided, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on either of the routes affected."

Following the recommendations of the Postmaster General, Congress inserted the following provision in the act approved August 24, 1912, making appropriations for the Post-Office Department for the fiscal year ending June 30, 1913:

"Sec. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other cases, and readjust the compensation on the routes affected accordingly; Provided, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected; Provided further, That readjustment made hereunder shall not take effect before July first,

nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve."

V.

That for many years it has been the practice and custom of the Post-Office Department to contract with the mail-carrying railroads, including your petitioner, for transporting the United States mails by transmitting to them agreements (otherwise called Distance Circulars) to be filled out, signed, and returned by the railroad companies to said Department.

That in accordance with such practice and following said custom, the Second Assistant Postmaster General, in or about the
6 month of June, 1910, to close the agreements with your petitioner for the transportation by it of the United States mails over its routes aforesaid during the four fiscal years commencing July 1, 1910, mailed to your petitioner with reference to each of said routes a printed form (Distance Circular) on which it was requested that the distances between all stations on the road be stated, and your petitioner's consent to render the service proposed on the basis of those distances and for the compensation therefor to be fixed in accordance with the law and with "the regulations of the Department applicable to railroad mail service" be noted.

The regular form of agreement between the Post-Office Department and your petitioner, covering the routes aforesaid, is printed on page two of said circulars and is in the following words, to wit:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

The said agreements with reference to each of said routes were signed by your petitioner's duly authorized official, were returned to the Post-Office Department, and were on file in that Department at the beginning of the contract period for said routes.

That said agreements were based on a previous weighing of all the mails carried over said routes for ninety successive working days beginning February 17, 1910, as a result of which said weighing the Post-Office Department stated the following as the average daily weights of mails transported over said routes.

Route No.	Average daily weight.
153010	35,701 pounds.
153016	3,802 pounds.
155098	7,873 pounds.

7 VI.

That thereafter, in or about the month of August, 1910, the Post-Office Department issued orders for routes Nos. 153010 and 153016 and in or about the month of October, 1910, for route No. 155098, establishing the annual pay of petitioner for transporting the mails

over said routes during the quadrennial period extending from July 1, 1910, to June 30, 1914, as follows:

Route number.	Annual pay.
153010	$192,220.29
153016	31,371.29
155098	31,889.25

That in each of said orders it was stated:

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

That since the making of its agreement aforesaid, petitioner has transported the mails whenever they were tendered to it for transportation and received therefor, down to July 1, 1912, compensation at the above-named rates.

VII.

That at the time of the weighing of the mails carried over the routes aforesaid for the readjustment of petitioner's pay for the quadrennial period from July 1, 1910, to June 30, 1914, petitioner operated a fast-mail train between Kansas City, Mo., and Oklahoma-Texas boundary line near Denison, Texas, which said train received at Vinita, Okla., mails transported over the lines of the St. Louis & San Francisco Railroad Company from St. Louis, Mo., and destined for points west and south thereof.

8 That thereafter, in or about the months of January and April, 1912, said fast-mail train was discontinued and has not been operated by petitioner since said time.

That as a result of the discontinuance of said fast-mail train, the mails formerly received by petitioner at Vinita, Okla., from St. Louis, Mo., and by it distributed over the territory west and south of said last-named city were diverted at said city and have not since said discontinuance been carried by petitioner in the same manner as theretofore.

That after such diversion of the mails, the Postmaster General, purporting to comply with the provisions of section four of the act of August 24, 1912, aforesaid, ordered a weighing of the diverted mails only for the number of successive working days included in the period from November 26, 1912, to December 16, 1912.

That as a result of such weighing, new average daily weights of mail carried over the routes aforesaid were stated as follows:

Route number.	New average daily weight.
153010	33,060 pounds.
153016	3,978 pounds.
155098	11,419 pounds.

That said new average daily weights compare with those theretofore ascertained as a basis for the readjustment for the quadrennial period from July 1, 1910, to June 30, 1914, as follows:

Route number.	New average compared with old.
153010	2,641 — pounds.
153015	175 + pounds.
155098	3,546 + pounds.

That after the ascertainment of said new average daily weights, to wit, on February 21, 1913, the Post-Office Department
9 issued orders readjusting petitioner's compensation for the transportation of the mails over the routes aforesaid from July 1, 1912, as follows:

Route number.	New annual pay.
153010	$181,306.25
153016	31,724.06
155098	37,735.56

That said new annual pay compares with that theretofore established for the quadrennial period from July 1, 1910, to June 30, 1914, as follows:

Route number.	New annual pay compared with old.
153010	$10,914.04 —
153016	352.77 +
155098	5,846.31 +

That since July 1, 1912, petitioner has transported the mails over the routes aforesaid whenever they have been tendered to it for transportation and has been paid therefor at the rates fixed in said order of February 21, 1913; that as a result of such payment, petitioner's compensation for carrying the mails over said routes during the fiscal year ending June 30, 1913, has been unlawfully diminished by the sum of four thousand seven hundred and fourteen dollars and ninety-six cents ($4,714.96).

VIII.

That immediately upon receipt of notice from the Post-Office Department that a weighing of the mails diverted as a consequence of the discontinuance of petitioner's fast-mail train as aforesaid had been ordered, upon the basis of which petitioner's compensation for carrying the mails over the routes before mentioned would be readjusted, petitioner protested against such weighing and readjustment unless all of the mails carried over said routes should be
10 weighed; that upon the receipt by petitioner, in or about the month of February, 1913, of the orders of the Post-Office Department readjusting petitioner's compensation for services over

said routes, based upon such weighing of the diverted mails only, petitioner made a like formal protest, and that the mail-pay warrants received by petitioner since the issuance of said orders in payment of such services have likewise been accepted under express protest that said readjustment was not lawful and was in excess of the authority conferred upon the Post-Office Department under the Constitution and laws of the United States.

Your petitioner avers that said readjustment was a breach of the agreements entered into by petitioner in or about the month of June, 1910, as aforesaid and consummated by the issuance in the months of August and October as aforesaid of orders by the Post-Office Department establishing petitioner's pay for mail transportation service over the routes herein involved during the quadrennial period from July 1, 1910, to June 30, 1914; that said agreements were made with reference to the laws and lawful departmental regulations then in force and such regulations as might thereafter be promulgated in conformity with the laws then in force; that at the time said agreements were entered into and for many years prior thereto readjustments of the compensation of the mail-carrying railroads, including your petitioner, were always made and could lawfully be made only upon the weighing of all the mails carried on the routes of said railroads; that said act of August 24, 1912, did not become effective until more than two years after said agreements were made and was no part thereof, and that, therefore, said readjustment, effective July 1, 1912, purporting to comply with the provisions of section four of said act, was and is null and void and of no legal effect.

Your petitioner avers that, even conceding the power of Congress to authorize a weighing of diverted mails only during a quadrennial period and the making of a new adjustment of petitioner's
11 compensation based thereon, Congress has not the power to authorize such a weighing and the making of such new adjustment so that the adjustment shall become effective as of a date prior to said weighing, as was done herein, and for this further reason your petitioner avers the readjustment of petitioner's compensation as aforesaid was void and of no legal effect whatsoever.

Your petitioner avers that the sum of $4,714.96 is justly due and owing to it by the United States for mail-transportation service during the fiscal year ending June 30, 1913, the same having been and still being unlawfully withheld from petitioner by the United States and its postal authorities in the manner and for the reasons herein set forth, and that there exists in favor of the United States and against your petitioner no debt, claim, or set-off by which the said amount herein prayed for may or should be reduced.

Your petitioner prays, therefore, that this honorable court will render a judgment in its favor against the United States in the full sum of four thousand seven hundred and fourteen dollars and ninety-six cents ($4,714.96), the same being due and wholly unpaid.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By C. E. SCHAFF, *President.*

12 STATE OF MISSOURI,
City of St. Louis, ss:

Before me, the subscriber, a notary public in and for the State and city aforesaid, appeared C. E. Schaff, known to me to be the president of the Missouri, Kansas & Texas Railway Company, and made oath before me that the allegations of said petition are true to the best of his knowledge, information, and belief.

C. E. SCHAFF.

Subscribed and sworn to before me this 12th day of August, A. D. nineteen hundred and thirteen.

[NOTARIAL SEAL.] CHARLES S. BURG,
Notary Public.

My commission expires March 8, 1916.

BRITTON & GRAY,
Attorneys for Claimant.

JOSEPH M. BRYSON,
General Counsel.

13 II. *Supplemental Petition.*

Filed Oct. 25, 1917.

Supplemental Petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Missouri, Kansas and Texas Railway Company, for its supplemental petition herein respectfully represents to the court as follows:

I.

That it realleges and adopts the allegations of the petition herein.

II.

That for the year from July 1, 1913, to June 30, 1914, petitioner's compensation for transportation of the mails on the routes
14 named in the petition was made, over its continued protest, at the rates fixed in the orders of February 21, 1913, mentioned in the petition.

That by reason of payment at such rates petitioner's compensation for carrying the mails over the routes named in the petition herein during the fiscal year ending June 30, 1914, has been unlawfully diminished by the sum of four thousand seven hundred and fourteen dollars and ninety-six cents ($4,714.96), which sum is now justly due and owing to claimant.

That no part of said sum has been paid, nor has any part of said claim been assigned, and there exists in favor of the United States and against petitioner no debt, claim, or set-off by which the said sum might or should be diminished.

Wherefore, your petitioner prays for judgment against the United States in the full sum of four thousand seven hundred and fourteen dollars and ninety-six cents ($4,714.96), in addition to the sum prayed for in the original petition herein.

MISSOURI, KANSAS & TEXAS RAILWAY CO.,
By BRITTON & GRAY, *Attorneys.*

DISTRICT OF COLUMBIA, *ss:*

Before me, the subscriber, a Notary Public, in and for the District of Columbia, personally appeared Alexander Britton, to me known and known to me to be a member of the firm of Britton & Gray, Attorneys for the Missouri, Kansas & Texas Railway Company herein, and made oath before me that the allegations of the foregoing supplemental petition are true to the best of his knowledge, information, and belief.

15 Subscribed and sworn to before me this 25 day of Oct., A. D. 1917.

F. C. KLEINSCHMIDT,
Ass't Clerk Court of Claims.

BRITTON & GRAY,
Attorneys for Claimants.

JOSEPH M. BRYSON,
General Counsel.

16 III. *General Traverse.*

Court of Claims.

No. 32573.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *Argument and Submission of Case.*

On June 5, 1918, this case was argued and submitted on merits by Mr. Alexander Britton, for the claimant, and Mr. Joseph Stewart, for the defendants.

17 V. *Findings of Fact and Conclusion of Law.*

Filed June 17, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

That plaintiff is a corporation duly organized and existing under the laws of the State of Kansas. In January, 1910, and at all times thereafter, claimant owned and operated a line of railway extending from Hannibal and St. Louis, Mo., on the north, to the northern boundary of the State of Texas, in the vicinity of Denison, Tex., with certain branch lines and extensions from said main line, over which line and branches plaintiff was in January, 1910, is now, and at all times since January, 1910, has been transporting the mails of the United States, the mail routes, so far as this case is concerned, being numbered 153010, 153016, and 155098.

II.

The plaintiff was transporting the mails on the routes hereinafter mentioned under terms of the readjustment of compensation which would expire on June 30, 1910. In anticipation of that fact the Postmaster General sent to the plaintiff "Distance circulars," known as Form No. 2504, which it was requested to fill out with certain information called for thereby, and to return the same to the Second Assistant Postmaster General. The plaintiff was requested to send with the distance circulars, among other things, two copies of its latest working schedule showing the trains operated over each of said routes. Plaintiff was also informed that a failure to promptly return the circular might cause a corresponding delay in adjusting compensation. There was a form on the distance circular containing an agreement clause to be signed by a principal officer of the plaintiff reading as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to Railroad Mail Service."

On or about June 30, 1910, the plaintiff returned said distance circulars to the Post Office Department, together with certain data with

respect to route No. 153010, Kansas City, Mo., to Denison, Tex., and route No. 153016, Parsons, Kans., to Oklahoma City, and route No. 155098, Sedalia, Mo., to Parsons, Kans. The foregoing agreement clause was duly signed by a proper officer of the plaintiff, and
18 to the clause as signed was appended an additional statement "protesting against regulations and practices of the departments," as follows:

1. Against the practice of weighing the mails and readjusting the pay only once in four years as too infrequent to be fair to the railroad.

2. Against furnishing rooms at stations for use of the Post Office Department employees for distribution of mail without payment of rental therefor.

3. Against requiring the company to furnish railway post-office cars except on the following basis:

Full line pay in both directions for the maximum size of car required and demanded by the department over any part of the route, in either direction, and for the full mileage of the natural operating run of the car.

4. Against furnishing space and facilities for distribution of mail on trains without specific and reasonable space pay therefor, in addition to the pay for the transportation of the mail by weight.

5. Against furnishing free transportation except that for railway postal clerks accompanying the mail, as provided in Revised Statutes 4000. (Section 1182, Book of Federal Laws and Regulations, 1902.)

6. Against the carrying of mail between stations and post offices at terminal and intermediate points, and between one railway station and another, and against handling the mail across platforms between the cars and Government contractors' wagons, except at large terminal stations.

7. Against setting mail cars at stations for use as distributing post offices more than a reasonable time necessary for loading, and against holding them at stations after arrival at destination for distribution of unworked mail, without specific pay therefor; and against the practice of the Post Office Department in imposing fines for failures for both, as car pay is authorized on a mileage basis.

8. Against deductions from mail transportation pay for failure of trains to run on routes where six times a week round-trip service has been performed, and against deductions for diverted mails, unless the amount deducted is credited to the carrying company instead of being appropriated by the Post Office Department.

9. Against night exchanges at points where there are no night agents, unless the department provides for the service.

10. Against fining the railway company several months after occurrences for failure of employees at stations or in trains to perform clerical work in connection with the handling of the mail, requesting instead prompt notice for enforcement of governing instructions, and to prevent recurrences.

In the distance circular for route No. 153010 which was returned

by the plaintiff it was represented to the Post Office Department that Vinita, Okla., was a railroad station or point on said route where mails were put on and off trains.

Thereafter, on June 30, 1910, the Second Assistant Postmaster General, acknowledging receipt of said distance circulars, stated to plaintiff that note was taken of the modification made by plaintiff in the agreement clause by which plaintiff excepted to certain orders of the department, and entered "protest against other rules, regulations, or requirements of the department with respect to the
19 performance of service," and that "the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that in the performance of service from the beginning of the contract term above named, and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of this service."

The plaintiff having replied to said notice of June 30, the Second Assistant Postmaster General, on August 12, 1910, again referred to the distance circular for route No. 153010 in a letter addressed to plaintiff or its general agent, and stated:

"I have to advise you that, in the performance of service on this route from the beginning of the contract term named and during the continuance of such performance of service, it must be understood that your company will be subject, as in the past, to the usual customs and practices in relation to railroad mail service as well as to the conditions stated in my letter" of June 30, 1910.

It has for many years been the custom of the Post Office Department to weigh the mails transported by railroads once in every four years, and the compensation was based on the average weights of mail as ascertained by said weighings.

III.

The Postmaster General caused the mails to be weighed on said routes and the average daily weight carried thereon to be computed, and on September 22, 1910, issued an order approving the order of the Second Assistant Postmaster General of September 15, 1910, stating the amount and rate of compensation for the service, as follows:

"Order No. B-17531.—153010—Oklahoma: Kansas City, Mo., and Denison, Tex.; Missouri, Kansas and Texas Railway Co.; 409.61 miles; 33.75 t. a. w.; A. D. W.—35,701 pounds.

"From July 1, 1910, to June 30, 1914, pay the Missouri, Kansas and Texas Railway Company, monthly, for the transportation of the mails between Kansas City, Mo., and Denison, Texas, at the rate of $192,220.29 per annum, being $360.20 per mile for 43.06 miles, Kansas City, Mo., and Paola, Kansas, lap over route 155008, and

$482.09 per mile for 366.55 miles, Paola, Kansas, and Denison, Texas, and for R. P. O. car service at the rate of $37,001.57 per annum, being $82.50 per mile for 94.69 miles, Kansas City, Missouri, and Moran, Kansas, for 2 lines 40-ft., and 1 line 50-ft. cars; $53.75 per mile for 42.13 miles, Moran and Parsons, Kansas, for 1 and ½ lines 40-ft. and ½ line 50-ft. cars; $82.50 per mile for 51.79 miles, Parsons, Kansas, and Vinita, Okla., for 2 lines 40-ft. and 1 line 50-ft. cars; $102.50 per mile for 221 miles, Vinita, Okla., and Denison, Texas, for 2 lines 40 ft., 1 line 50 ft., and ½ line 60-ft. cars.

"This adjustment is subject to future orders, and to fines and deductions, and is based on a service of not less than six round trips per week."

On September 15, 1910, the Second Assistant Postmaster General sent to the railway company a notice of such readjustment of pay, as follows:

20 "The compensation for the transportation of mails, etc., on route No. 153010, between Kansas City, Mo., and Denison, Texas, has been fixed from July 1, 1910, to June 30, 1914 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing Feb. 17, 1910, at the rate of $192,220.29 per annum, being $360.20 per mile, for 43.06 miles Kansas City, Mo., and Paola, Kansas, lap over route 155008, and $482.09 per mile for 366.55 miles, Paola, Kansas, and Denison, Texas, and pay is allowed for use of R. P. O. cars from July 1, 1910, to June 30, 1914, at the rate of $37,001.57 per annum, being $82.50 per mile for 94.69 miles, Kansas City, Mo., and Moran, Kansas, for 2 lines 40-ft. and 1 line 50-ft. cars; $53.75 per mile for 42.13 miles, Moran and Parsons, Kansas, for 1 and ½ lines 40-ft. and ½ line 50-ft. cars; $82.50 per mile for 51.79 miles, Parsons, Kansas, and Vinita, Okla., for 2 lines 40-ft. and 1 line 50-ft. cars; $102.50 per mile for 221.00 miles, Vinita, Okla., and Denison, Texas, for 2 lines 40-ft., 1 line 50-ft., and ½ line 60-ft. cars.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

Like orders were made readjusting the pay on route 153016 on August 9, 1910, and like notice sent to the company on the same date, and on route 155098 on October 5, 1910, and a like notice sent to the railway company on the same date. The average daily weights of mail so ascertained as carried on the two last-mentioned routes and the annual rates of pay fixed by said orders for transportation were as follows: On route No. 153016, 3,802 pounds, $31,371.29; on route No. 155098, 7,873 pounds, $31,889.25.

The plaintiff thereafter carried and continued to carry the mails upon said routes and received the compensation allowed therefor in the foregoing orders of the Postmaster General until July 1, 1912.

IV.

On or about January 20, 1906, the plaintiff notified the Second Assistant Postmaster General that on February 1, 1906, a fast mail train would be established on plaintiff's railway system, leaving Parsons, Kans., daily, and protecting a connection at Vinita, with the Frisco system train No. 3, and proceeding south to Taylor, Tex., there overtaking plaintiff's train No. 5, which would proceed to Houston, Galveston, and San Antonio, Tex., and further stating approximately the time of the new train, and again on January 30, 1906, the plaintiff's duly authorized agent, together with the agent of the Frisco system, filed with the Second Assistant Postmaster General the time table affecting said road and said fast mail train.

On or about March 16, 1906, the plaintiff and the St. Louis & San Francisco Railroad Co., through their proper agents, notified the Second Assistant Postmaster General relative to said new train that the service of said train would "positively be maintained during a period of four years, commencing July 1, 1906," and added that the only proviso which the two railroad companies made was that this official guaranty is predicated upon the continuance of the
21 present rates and regulations affecting compensation, and that in the event of a change only would the railroad companies depart from the above guaranty. The Second Assistant Postmaster General replied that the department understood this written statement to be in confirmation of the statements made by the officers of the company relative to the establishment of said train service and mail service thereon. There was no other agreement with reference to the continuance of such train after June 30, 1910. In January, 1912, said fast mail train was discontinued by the plaintiff, and in April, 1912, the service of said train on the Frisco was discontinued.

V.

In his report to Congress for the fiscal year ending June 30, 1907, The Postmaster General informed Congress that under the law and the then practice compensation for railroad transportation on any one section was not readjusted oftener than once in every four years upon a general weighing of the mails, and that on account of the expense, it has been thought inadvisable to order them weighed more frequently; that as a result "when mails are diverted from one route to another during the term, payments continue to be made to railroad companies for the remainder of the term for weights which they have ceased to carry, and there is no existing practice by which the railroad company carrying such diverted mail may be compensated therefor." He suggested that there should be some practicable and equitable method of readjusting pay in such instances. He further suggested that there was a question as to whether the Postmaster General had sufficient authority under existing law to make readjustments in such cases without a new weighing of all the mail carried over the routes affected, and that in order to remove doubt and pro-

vide a suitable method for such readjustment certain legislation was recommended. The legislation so recommended was substantially enacted as section 4 of the act approved August 24, 1912, making appropriations for the Post Office Department for the fiscal year ending June 30, 1913, as follows:

"Sec. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other cases, and readjust the compensation on the routes affected accordingly: Provided, That no readjustment shall be made under the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: Provided, further, That readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve."

VI.

When in January, 1912, the plaintiff withdrew its fast mail trains Nos. 7 and 4 on route No. 153010, there was a discontinuation of mail service on said trains which broke connection at Vinita,
22 Okla., with the said fast mail train of the Frisco system above mentioned, and a consequent delay in a large volume of Texas and Oklahoma mail which had been diverted from other lines to those of the plaintiff, and for which it had received credit by reason of the establishment of said fast mail-train service.

Prior to the readjustment of compensation on said routes for the quadrennial term beginning July 1, 1910, the plaintiff did not notify the Post Office Department that said fast mail-train service would be discontinued, and when the department was notified of the plaintiff's intention to withdraw said fast mail train, the Second Assistant Postmaster General notified the plaintiff that said action would be regarded as a violation of the contract, and would subject the company to a heavy penalty. The plaintiff denied that it had any contract obligating it to operate said train longer.

Because of plaintiff's action in discontinuing said service it became necessary for the Post Office Department to provide for the redispatch of the mails in question over other lines and routes for the purpose of securing prompt delivery thereof, and this was done in March, 1912.

Thereafter, on November 22, 1912, the Second Assistant Postmaster General directed the General Superintendent Railway Mail Service to weigh for a period of 21 days, commencing November 26, 1912, the mails diverted to other lines by reason of the plaintiff's discontinuance of its fast mail trains and those of the Frisco-Missouri, Kansas & Texas fast mail train between St. Louis, Mo., and Denison, Tex., in January and April, 1912. The instructions were

to weigh only such mails as might be definitely identified as having been formerly carried on said routes, and in case of doubt the mail should not be weighed, and the plaintiff was advised of the action taken and that a readjustment of pay from July 1, 1912, would be based thereon.

VII.

After the average daily weights of the diverted mails had been ascertained, the following order was issued by the Postmaster General on March 1, 1913, approving an order of the Second Assistant Postmaster General of February 21, 1913:

"Order No. K-3231.—153010—Oklahoma; Kansas City, Mo., and Denison, Texas; Missouri, Kansas and Texas Railway Company; 409.61 miles; 33.73 trips per week; $192,220.29 transportation; $37,001.57 R. P. O.

"From July 1, 1912, compensation for the transportation of the mails on route No. 153010 is restated at the rate of $181,306.25 per annum, being $334.96 per mile for 43.06 miles, Kansas City, Mo., to Paola, Kansas, lap over route 155008, and $455.28 per mile for 366.55 miles, Paola, Kansas, to Denison, Texas.

"This adjustment is made in accordance with the provisions of section 4 of the act of August 24, 1912, and is due to the diversion of mails at St. Louis, Missouri, resulting from the discontinuance of the Frisco-Missouri, Kansas and Texas fast mail train in January and April, 1912.

"(New average daily weight, 33060 pounds.)"

On February 21, 1913, like orders were made on the other routes involved herein operated by plaintiff. The new average daily
23 weights of mails so ascertained as carried on the other routes and the new annual rates of pay fixed by said orders for transportation were as follows: On route No. 152016, 3,978 pounds, $31,724.06; on route No. 155098, 11,419 pounds, $37,735.56. By letter of February 21, 1913, the Second Assistant Postmaster General notified plaintiff of said readjustments, giving in such notice the copies of the orders so made.

On February 26, 1913, the plaintiff acknowledged receipt of the notice of readjustments, noting the result to said company of such as being a decrease of $10,914.04 on route 153010, and an increase of $581.06 on route 153016, and $5,846.31 on route 155098, and protested against said readjustments.

On March 10, 1913, the Second Assistant Postmaster General replied to plaintiff's letter of February 26, after acknowledging receipt, etc., as follows:

"Note is taken of your statement that your company protests against the readjustment of pay on the routes referred to without a reweighing of all the mails handled on such routes and 'declines to accept the compensation proposed in your letter of the 21st instant. The department is hereby notified that this company will expect compensation under the last quadrennial weighing until such time

as all of the mails handled on such routes are again weighed in accordance with the laws governing same.' In reply to this your attention is invited to the express language of section 4 of the act of August 24, 1912, which provides for a 'weighing of such mails' as have been diverted. The act does not contemplate a weighing of all the mails carried on the routes affected, but merely of the diverted mails. Referring to your statement that your company declines to accept the compensation stated in the adjustment orders, I have to say that such compensation is the maximum that will be paid for service on the routes in question, and the receipt by your company of such compensation is regarded by the Post Office Department as full payment for service rendered.

"With respect to your statement that it can not be determined whether the diverted mails represent 10 per cent of the average daily weight on any route without weighing all of the mail on such route at the same time the diverted mails are weighed, I have to say that this apparently proceeds upon the theory that the law contemplates that the diverted mails shall equal 10 per centum of the average daily weight of each of the routes affected before a readjustment thereon is authorized by the law. The department construes the law to mean that before a readjustment on the routes shall be made it is only necessary that it be determined that the diverted mails equal at least 10 per cent of the average daily weight of any one of the routes involved in the diversion, notwithstanding the diverted mails may not equal 10 per cent of the average daily weight of every route affected.

"With this understanding of the department's construction of the law it is not believed your company will insist that the adjustment was made in violation of the law."

The amount of the mails diverted was in excess of 10 per centum average daily weight on some of the routes affected.

On March 25, 1913, the plaintiff informed the department that warrants covering the pay on routes involved would be accepted under protest. On April 12, following, the Second Assistant Postmaster General replied that the compensation stated in the readjusting orders referred to was the maximum that could be allowed for service on the routes covered, and the receipt by the company of such compensation was regarded by the department as full payment for service rendered thereon.

VIII.

By reason of the discontinuance of the mail trains in question and the consequent necessary diversion of mails to other lines, a number of other readjustments on other lines of railroads were made contemporaneously with those under consideration as a result of said diversions, the net result of which was an increase in the total pay of all roads concerned of $11,727.34 per annum.

Conclusion of Law.

Upon the foregoing findings of fact the court concludes, as a matter of law, that the plaintiff is not entitled to recover. It is therefore adjudged and ordered that the petition be dismissed, with judgment in favor of the United States against the plaintiffs for the cost of printing the record in this cause in the sum of sixty dollars and forty-three cents ($60.43).

25 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington, on the Seventeenth day of June, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the Missouri, Kansas and Texas Railway Company, as aforesaid, is not entitled to recover, and shall not have and recover any sum in this action of and from the defendants, the United States, and that the petition be dismissed: And it is further ordered, adjudged, and decreed that the United States shall have and recover of and from the Missouri, Kansas and Texas Railway Company, as aforesaid, the sum of Sixty Dollars and forty-three cents ($60.43), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VII. *Claimant's Application for and Allowance of Appeal.*

Comes now the Missouri, Kansas & Texas Railway Company, petitioner in the above-entitled cause, and by counsel prays the court to grant an appeal to the Supreme Court of the United States from the decision and judgment of the Court of Claims in favor of the United States dismissing the petition, said decision being rendered June 19, 1918.

BRITTON & GRAY,
Attorneys for Petitioner.

Filed August 16, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

August 22, 1918.

26

Court of Claims.

No. 32573.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the argument and submission of case; of the findings of fact and conclusion of law; of the judgment of the court; of the claimant's application for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington this Twenty-third day of August, A. D. 1918.

[Seal of Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,727. Court of Claims. Term No. 641. The Missouri, Kansas & Texas Railway Company, appellant, vs. The United States. Filed August 27th, 1918. File No. 26,727.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 52.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement.

This case comes by appeal from a final judgment of the Court of Claims dismissing a petition filed by the Missouri, Kansas & Texas Railway Company seeking to recover nine thousand four hundred and twenty-nine dollars and ninety-two cents ($9,429.92) claimed to have been erroneously withheld from the company's pay for transporting the mails.

The facts found by the Court of Claims, stated briefly, are as follows:

January 20, 1906, appellant, in connection with the St. Louis & San Francisco Railroad Company, established a fast-mail train running from St. Louis, Missouri, to Denison, Texas, and agreed to maintain said train service until June 30, 1910, which was done.

The quadrennial service and pay of appellant, under the contract of 1906, terminated June 30, 1910, and in February, 1910, anticipating a contract for service from June 30, 1910, to July 1, 1914, the company executed and filed its distance circular, wherein

> "the company named below agrees to accept and per-
> "form mail service upon the conditions prescribed by
> "law and the regulations of the department applicable
> "to railroad mail service."

The mails were duly weighed and in September, 1910, the Postmaster General notified the company that its pay from July 1, 1910, to June 30, 1914, had been fixed at certain sums on its several mail routes, and that

> "this adjustment is subject to future orders and to
> "fines and deductions and is based on a service of not
> "less than six round trips per week."

There was no agreement that the company should maintain its fast-mail schedule beyond June 30, 1910.

After repeated recommendations by the Postmaster General, Congress, on August 24, 1912, two years after the above-stated orders fixing pay on these routes, passed an act which provided:

> "SEC. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other

cases, and readjust the compensation on the routes affected accordingly: *Provided,* That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: *Provided, further,* That readjustments made hereunder shall not take effect before July 1, 1912, and shall be for divisions occurring after January 1, 1912."

In January, 1912, appellant practically withdrew its fast-mail train by changing its schedule so as to break connections at Vinita, Indian Territory, and on November 22, 1912, the Postmaster General issued orders to weigh for a period of 21 days such mail only as could be identified as being diverted from appellant's routes by reason of such change of service.

March 1, 1913, the Postmaster General issued orders readjusting the pay on these routes *from July 1, 1912,* basing the new pay upon a daily average weight of mails ascertained by deducting from the average found by the February, 1910, weighings the amount of diverted mail found by the weighing in November, 1912.

Appellant claimed that the normal increase between 1910 and 1912 in weight of mails carried should be taken into consideration; that the diverted mail had increased in weight between January, 1912, when diverted, and November, 1912, when weighed, and that the Postmaster General could not correctly certify to a diversion of at least 10 per centum unless he took these facts into consideration.

Being denied relief by the Postmaster General, suit was instituted in the Court of Claims, which court dismissed the petition without opinion.

Errors of Law Are Assigned.

I.

The contract being executed and in full force in 1910 for a period of four years, the diversion of mails having occurred in January, 1912, it was error to hold that an act passed subsequently and in August, 1912, could be made retroactive and apply to this case.

II.

The act of August 24, 1912, only authorized the Postmaster General to act when the diverted mails equalled at least 10 per centum of the average daily weight on any of the routes affected, and it was error to sustain his exercise of power in weighing mails in November, 1912, to ascertain weights diverted in January, 1912.

III.

The act of August 24, 1912, only conferred power on the Postmaster General to readjust pay when the diverted mails equalled at least 10 per centum of the average daily weight and it was error in sustaining his action in applying a weight of diverted mails taken in November, 1912, to a daily average taken in February, 1910, which daily average had immensely increased between said dates.

IV.

It was error for any cause to have dismissed the petition.

ARGUMENT.

I.

The contract being executed and in full force in 1910 for a period of four years, the diversion of mails having occurred in January, 1912, it was error to hold that an act passed subsequently and in August, 1912, could be made retroactive and apply to this case.

There can be no question that the relation between the carriers and the United States was a contractual relation.

It is provided by the Revised Statutes as follows:

> "SEC. 3942. The Postmaster General may enter into contracts for carrying the mail with railway companies, without advertising for bids therefor."
>
> "SEC. 3956. No contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

The statutes clearly contemplate that railway mail service shall be rendered by contract.

The Postmaster General invited the railroad to offer service by sending it the Distance Circular. By signing and filing the circular the road agreed to perform the service and stated its terms. The terms of the contract were then fixed. It was consummated by the act of the Postmaster General in offering the mails for transportation and accepting the service. His subsequent act in giving notice of the rate of compensation was purely ministerial, as the elements of that rate were all previously known; the average daily weight fixed by the weighing begun in February, the mileage fixed by the Distance Circular, and the method of compensation and the rate per annum fixed by statute (Act of March 3,

1873, 17 Stat., 558; Act of March 3, 1905, 33 Stat., 1082, and Act of March 2, 1907).

But, regardless of whether the contract is finally consummated by the act of the Postmaster General in putting mail on the trains after receiving the Distance Circular, "or by the act of the railroad in carrying mail after receiving the notice of compensation, it is the fact that the railroad's contract is evidenced and expressed by the Distance Circular."

The term of the contract is four years, and all the other conditions are expressed in the agreement

> "to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

The provision of the order adjusting compensation, that it is "subject to future orders," means, of course, future orders consonant with the law and regulations.

That it was entering into a formal expressed contract in accordance with the terms of the Distance Circular for a four-year period is clearly expressed in the letter of the Post Office Department, by the Second Assistant Postmaster General, to Mr. G. M. Lindsay, Mail Traffic Manager of the Missouri, Kansas & Texas, dated June 30, 1910 (Report P. O. Dept.). The railroad had accompanied its Distance Circular with certain protests. The Department wrote in part:

> "This office is in receipt of the distance circular for Route No. 153,010, from Kansas City, Mo., to Denison, Texas, filed by you for the term beginning July 1, 1910, and ending June 30, 1914, for railroad mail service by your company. In regard to this I have to advise you that the Department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation and it must be understood that in the performance of service, from the beginning of the contract term named and during the con-

> tinuance of such performance of service your company will be subject as in the past to all the postal laws and regulations which are now or may become applicable during the term to this service."

This is a clear recognition that the act to be effected by the filing of the Distance Circular was the expression of the terms of a four-year contract.

The courts have not hesitated to confirm the view that the mail is carried by railroads under an express contract for four years. For example, in the case of Atchison, Topeka & Santa Fe Railway *vs.* United States, 225 U. S., 640, the court said (p. 640):

> "The Atchison, Topeka & Santa Fe Railroad had a four-year contract with the Post Office Department to carry the mail between Chicago and Kansas City. * * *
>
> "This contract was to expire June 30, 1907, by limitation, and with a view of obtaining data and proposing terms for a new arrangement to begin July 1, 1907, the postal authorities in February mailed to the company a 'Distance Circular' which, among other things, stated that the company was to accept and perform mail service under the conditions prescribed by law and the regulations of the Department? The form was filled out and signed by an agent of the company. He, however, noted exceptions to certain postal orders previously promulgated and 'future regulations which, in the company's opinion, might be unjust or unfairly reduce its compensation for services.' The circular with these objections was not received by the Department until July 24th, but the company in the meantime, and without any express contract, continued to carry the mails and to furnish the three car lines."

There is here a definite expression that the railroad carried mail under a four-year contract prior to 1907, and that the purpose of the Distance Circular was to express the terms

of another express contract for the succeeding four-year period.

A more direct statement is found in Union Pacific Railroad Co. *vs.* United States, 219 Fed., 427. Here the Circuit Court of Appeals (Eighth Circuit), said:

> "The legal relation existence between the United States and the railroad company was contractual. The company agreed, in consideration of the payment of a stipulated sum for the service that it would 'accept and perform the service upon the conditions prescribed by law and the regulations of the Department.' This language in express terms made all applicable provisions of law and regulations a part of the contract."

The most recent judicial expression on the relation of railway mail carriers to the Government is in Great Northern Railway Co. *vs.* United States, 236 Fed., 433. Here again the Circuit Court of Appeals for the Eighth Circuit speaks as follows:

> "These contracts were for four years and were expressly authorized by law. They were therefore valid and binding on the United States, as well as upon the railroad company, for that length of time. They contained within themselves a mode for lessening, or if deemed best, for discontinuing entirely the described service, and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement, and the United States would have been liable to damages for its breach in the same manner and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. C. & N. W. Ry. Co. *vs.* United States, 104 U. S., 680; 26 L. Ed., 891.
>
> "Contractual relation is established by the distance

> circular and its acceptance, and is uniformly assumed and recognized by the courts. Where the service is performed under such distance circular and acceptance, it is performed under a contract between the Government and the company doing the service. United States *ex.* Atlantic Coast Line R. R. Co. (C. C.), 189 Fed., 779. * * *
>
> "Instances might be multiplied where different courts have recognized the contractual relation between the Government and its mail carriers, and we are therefore of the opinion that a distance circular and its acceptance constitute a contract for a separate and distinct term of four years."

The Government hereby clearly entered into a contract with claimants to carry the mail for four years on "the conditions prescribed by law."

The exact terms of the contract are then found in the law existing when the contract was made. The railroad contracted to carry the mail for four years under those laws.

> "The same principles of right and justice which prevail between individuals should control in the construction and carrying out of contracts between the Government and individuals" (United States *ex.* Stage Co., 199 U. S., 414, at p. 423).

No principle of contract law is more firmly established than that the terms must be definite and that the minds of the parties must meet.

The terms of the present contract were expressed in the statute, and no statutes other than those in effect at the time of making of the contract could constitute definite terms.

Nor could the minds of the parties meet on statutes not in being as part of the terms of the contract.

Since the act of March 3, 1873, the basis of adjustment for railway mail pay has been fixed by law as

> "* * * the average weight to be ascertained in every case, by the actual weighing of the mails for

> such a number of successive working days, not less than thirty, at such times after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

By the act of March 3, 1905 (33 Stat., 1082, 1088), this provision was re-enacted, increasing the minimum weighing period to ninety successive working days as follows:

> "That hereafter before making the readjustment of pay for transportation of mails on railroad routes the average weight shall be ascertained by the actual weighing of the mails for such number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

It was thus provided that railway mail pay might be readjusted at any time by the Postmaster General on the basis of weight as ascertained by an actual weighing of the mails on the route for the statutory period. This statutory provision was written into claimant's contract by its agreement set out in the Distance Circular. By this contract the basis of readjustment of pay was fixed until June 30, 1914, and during that period the pay could be readjusted on no other basis without violating the contract.

This legal conclusion is thoroughly consonant with the provision of the notice of pay adjustment that it is "subject to future orders." Such future orders are, of course, orders made in compliance with the law which expresses the contract. The claimant here has at no time claimed that it was improper for the Postmaster General to readjust its pay because of diversion of mails to or from its lines; it claims that the Postmaster General failed to readjust its pay upon the only basis he could under its contract legally em-

ploy, namely, an average daily weight ascertained by an actual weighing of all the mails on the route for the statutory period.

If there were any doubt of this limit to the Postmaster General's power of readjustment it was resolved by the Supreme Court in Chicago, Milwaukee & St. Paul Railway Co. *vs.* United States, 198 U. S., 385. Here, after quoting section 4002, Revised Statutes, embodying the provision of the act of 1873 for readjusting pay on the basis of average weight and providing the method of ascertaining the average daily weight by actual weighing for the statutory period, the court says:

> "The Postmaster General is given the power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation. The orders of December 1 and December 3, respectively, reserved this power, and the only limitation on its exercise expressed in section 4002 is as to the manner of ascertaining the rate, which is to be by the average weight of the mails."

Whatever power, then, the Postmaster General has to readjust compensation and whatever discretion he may have as to rate, the readjustment must be on the basis of average daily weight, and that weight must be ascertained by actual weighing of the mails for ninety days. This was part of the contract claimant had with the United States.

Let us see how completely the Postmaster General disregarded this obligation. The mails on claimant's route having been weighed for the four-year term in the spring of 1910, and compensation having been adjusted in the fall of 1910, diversions having been made to and from claimant's routes in the spring of 1912, the claimant was notified by letter of November 27, 1912, that a twenty-one days' weighing would be had beginning November 26, 1912, of

> "such part of the mails diverted to other lines at St. Louis from the St. Louis & San Francisco and

> Missouri and Texas lines, following the discontinuance of the Frisco, Missouri, Kansas and Texas fast mail train between St. Louis, Missouri, and Denison, Texas, in January and April, 1912, that may be definitely identified." (See Report P. O. Dept.)

On November 29, claimant's mail traffic manager inquired when weighing would be begun on their lines (Report P. O. Dept.). By letter of December 5, the Department advised claimant that

> "it has been found practicable to weigh all the mail either at St. Louis or on the Iron Mountain and Missouri Pacific trains. It is therefore unnecessary to weigh any mails on the trains of your company" (Report P. O. Dept.).

The claimant thereupon protested against such procedure (Dec. 12, 1912).

On February 21, 1913, the Post Office Department notified claimant that from July 1, 1912, compensation would be readjusted on routes 153,010, 153,016, 155,098, 150,028, 150,100 (Report of P. O. Dept.).

Claimant at once entered protest under date of February 26 (Report P. O. Dept.).

By date of March 6, the Department notified claimant of a readjustment on route 150,128 (Report P. O. Dept.).

Under date of March 25, both claimants notified the Department that all warrants for pay under readjusted rates were received under protest.

The fact is, then, that the Postmaster General made adjustment on six routes, three routes of each claimant here, without weighing a pound of mail on any one of them. This was in the face of a contract calling for readjustment only on the basis of average daily weight to be ascertained by actual weighings of the mail carried for not less than ninety days. The violation of the contract is clear. And, to paraphrase the words of the court, Great Northern Railway Co. *vs.* United States, *supra*.

> "* * * the United States is liable to damages for its breach in the same manner and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims."

It is such remedy which claimants now ask. The Postmaster General having failed to pursue the method allowed by the contract for the readjustment of pay on a change of weight, his action was utterly void and the pay to which claimant was entitled was not changed during the contract period.

The Government was held bound to its contract for mail service in a similar case, in Chicago Northwestern Railway Co. *vs.* United States, 104 U. S., 683. Here there were four-year contracts running from 1875. In 1876 and 1878 Congress reduced the rates for railway mail transportation. The Postmaster General put the new rates in effect on the routes covered by the contract. In giving judgment for the claimant the court said:

> "It is argued, however, on the part of the Government, that the legal effect of what was done was to abrogate the old contracts and make new ones. It is claimed that the passage of the acts of Congress of July 12, 1876, c. 179, and of June 17, 1878, c. 259, and the notices from the Post Office Department that the reductions assumed to be contemplated by them would be insisted on; the fact that they were made in the adjustment of accounts, and that the railroad company notwithstanding its protest, continued to perform the service—had the effect to supersede the contracts of 1875, and substitute new ones in their stead, on the basis of the reduced compensation. Such, in substance, was the view taken by the Court of Claims.
>
> "In our opinion, that view cannot be maintained. The contracts of 1875 were for four years, and were expressly authorized by law. They were, therefore, valid, and binding on the United States as well as upon the railroad company. They contained, within

> themselves, a mode for lessening, or, if deemed best, for discontinuing entirely, the described service; and provided for a proportionate reduction of the stipulated compensation. In no other mode could the contract be changed, except by the mutual assent of the parties. Any change attempted by either, otherwise, would have been merely a breach of the agreement; and the United States would have been liable to damages for its breach, on the same principles and to the same extent as a private party, for which a suitable remedy was provided by law in the jurisdiction conferred upon the Court of Claims. In this respect, the relation between the parties was that of perfect equality in right."

So here there was a contract which provided means within itself for readjusting compensation, and that was the only mode in which it might be done. The Postmaster General, in attempting to readjust the pay by a different method, deliberately broke the contract. The United States is consequently liable for damages for the breach, which amount to the difference between the rate contracted for and the rate paid.

That the Postmaster General purported to act in accordance with an act of Congress makes no difference. So did he in the Chicago & Northwestern case, *supra*. In that case the court held the Postmaster General misinterpreted the statute, as we here hold. But even if he did not, the case would not be altered, for the United States had no more right to alter its obligation under a contract than any other party, and any impairment of the obligation of a contract by congressional act is unconstitutional. As the Supreme Court said in the Sinking Fund cases, 99 U. S., 700 (p. 718):

> "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of

contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

Though three dissenting opinions were written in this case, each of them concurs in the proposition that Congress has no power to impair the obligation of a contract of the United States. Thus Justice Strong (at p. 731):

"In my opinion, the act of Congress of May 7, 1878, is plainly transgressive of legislative power. As was said by Mr. Hamilton in his celebrated communication to the Senate of Jan. 20, 1795, 'when a government enters into a contract with an individual it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.' 3 Hamilton's Works, 518, 519. Opinions similar to this have often found expression in judicial decisions, even in those of this court. If this be sound doctrine, it is as much beyond the power

> of a legislature, under any pretence, to alter a contract into which the government has entered with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract the government in all its departments had laid aside its sovereignty, and it stands on the same footing with private contractors."

Justice Bradley (at p. 746) says:

> "But if it were not, as it is, an actual or physical taking of property, if it were merely subversion of the contract and the substitution of another contract in its place, it would be a taking of property within the spirit of the constitutional provisions. A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law."

And Justice Field (at p. 766):

> "In the second place, legislation impairing the obligation of contracts impinges upon the provision of the Constitution which declares that no one shall be deprived of his property without due process of law; and that means by law in its regular course of administration through the courts of justice. Contracts are property, and a large portion of the wealth of the country exists in that form. Whatever impairs their value diminishes, therefore, the property of the owner; and if that be effected by direct legislative action operating upon the contract, forbidding its enforcement or transfer, or otherwise restricting its use, the owner is as much deprived of his property without due process of law as if the contract were impounded, or the value it represents were in terms wholly or partially confiscated."

This unanimous concurrence of a divided bench on a certain doctrine has established it beyond question.

If, therefore, the act of the Postmaster General in readjusting compensation on a basis not authorized by the contract was in compliance with the act of Congress, the act is, to the extent that it directs such breach of contract, unconstitutional, and the right of claimants is not affected thereby.

It will no doubt be urged that the railroads by continuing to carry the mail after the readjustment named waived their rights. There is no foundation in law for such a conclusion. The claimant protested against the adjustment; it protested against the reduced pay; it cannot be said to have acquiesced in the action of the Postmaster General. The effectiveness of timely protest in the matter of mail compensation was established by this court in the case of Philadelphia & Baltimore Central R. R. Co. *vs.* United States, 13 C. C., 199. Here the road transported mail from 1873 to 1877 at a uniform rate. In December, 1875, it protested against the rate and method of compensation, but continued to furnish the service. At the end of the four-year period it sued for a different rate of pay for the whole term. The court gave it judgment for all time subsequent to the filing of the protest. This was not disturbed by the Supreme Court (103 U. S., 703).

In the Chicago & Northwestern Railway case, *supra*, the court said on the question of waiver (p. 686):

> "And the performance by the company of the service required by its contract notwithstanding the notice of the intended reduction of the compensation by the Postmaster General, cannot be construed as a waiver of its rights or an acquiescence in new proposals; and that whether it had protested against the erroneous construction of the law or not. For it had no option. It was bound by its contract to perform the service, and its performance was demanded. It was not in a position absolutely to refuse to carry the mails, for it was bound to carry them, if offered, on some terms, either prescribed by law or fixed by contract; and it

had the right to do so, without prejudice to its lawfu
claims, leaving the ultimate right to future and fina
decision."

It may be said that this reasoning applied to a land-gran
road only, which was obliged to carry the mail; but in the im
mediately following case of Chicago, Milwaukee & St. Pau
Railway Company, 104 U. S., 687, which was not a land
grant road, the court held no waiver of rights arose by th
continuance of performance, the rights of the parties bein
fixed by the contract.

It would indeed be a novel doctrine that when one party
offers to commit a breach of contract, the other party has n
choice but to acquiesce or to discontinue performance.
breach by one party may give the other the right to discon
tinue performance, but it cannot take away his right to per
form as fully as he can and recover according to the terms o
the contract.

In concluding this branch of the case, we wish to distin
guish two cases which might at first glance seem authority
for a contrary view. The earlier and more important, be
cause the second largely follows it, is Eastern Railroad Co
vs. United States, 129 U. S., 391. Here the railroad without
express contract carried the mails, on a weighing in 187
and an order of the Postmaster General fixing compensation
for four years. In 1876 and 1878 the rate of pay was re
duced by statute. The Postmaster General put the reduc
tions into effect during the four-year term. The road made
no protest of any kind. At the end of the four-year term
it sued for the full compensation, which was refused. There
are here three distinctions from the present case.

1. There was no evidence of contract except in the order
fixing compensation, which reserved the right to change
compensation.

2. The change was a change of rate and not a change of
method of adjustment.

3. "It does not appear that the company at any time before the commencement of the action made any protest against or objection to the readjustment made by the Postmaster General" (statement by court).

The case was decided practically on the waiver of rights by failure to protest.

In the present case the agreement of the carrier was evidenced not merely by its carrying of the mails after receiving the original order fixing compensation, but its obligation was clearly expressed by the agreement in the Distance Circular to carry the mail "on the conditions prescribed by law, etc." But this agreement, making an express instead of an implied contract and making all the then existing law part of the terms of the contract, was entirely absent from the Eastern Railroad case.

The breach of contract here alleged is not, as in the Eastern Railroad case, caused by a change in rate, but by a change in the basis of application of the rate. There is still some dispute whether the statute (Act of 1873) fixed absolute rates of pay, but there has never been any dispute that it fixed an absolute basis of readjustment.

In the Eastern Railroad case the deciding factor was apparently the absence of any protest against the change until suit was commenced. In the present case no claim is made that the claimants did not protest in every way available against the readjustment. No waiver can even be alleged to have been committed.

The recent case of Delaware, Lackawanna & Western Railroad Company *vs.* The United States follows the Eastern Railroad case. Without acquiescing in the decision of this case, we may distinguish it from the case at bar.

To begin with, the railroad's contract was on a different form of Distance Circular, by which the railroad made its agreement only "if authorized" to perform service. The terms of the order fixing compensation here enter into the

contract, as it authorizes the service and its reservation of power to change rates is, therefore, of broader effect than in the present case where the contract is complete before the order.

As in the Eastern Railroad case, this is a question of change of rate only. As we pointed out there, the question of whether the statute fixes absolute rates may be in dispute; the question whether it fixed a basis for readjustments is not.

But a more far-reaching distinction lies in the fact that the change in the Delaware, Lackawanna & Western case was prospective, the change in the present case retrospective. The law changing rate of compensation was passed March 2, 1907, and was made effective from July 1, 1907. In the present case the law under which the Postmaster General purported to act was passed August 24, 1912, made effective as to diversions occurring in April, 1912, and made effective as to compensation from July 1, 1912, although the weighing in purported compliance with it was not had until November, 1912, and the orders for readjusted compensation did not issue till February, 1913.

No case can be cited to the effect that any executive officer acting with or without legislative authority can invade an express contract entered into by the Government by violating a clear condition thereof. That is exactly what was done in the present case, and the claimant is entitled to recover as for any other breach of contract.

II.

If the new statute changed the contract it did so only as to future diversions.

In distinguishing the Delaware, Lackawanna & Western case, we have pointed out that the action of the Postmaster General was retroactive. To be sure the statute under which he purported to act is apparently retrospective. Approved August 24, 1912, it contains a proviso:

> "That readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve."

But even should the court find that the Postmaster General acted in accordance with the statute, and that as to its prospective operation the statute was valid under the claimant's contract, the claimant's right to recover would be unaffected, for any retroactive operation of the statute is an impairment of the claimant's contracts and unconstitutional.

The cases in which a change of rate during the contract term by statute has been sustained, to wit, the Eastern Railroad case and the Delaware, Lackawanna & Western case, *supra*, proceed in part upon the theory that there was a reservation in the contract of right to change such rates, either in the order fixing compensation or in the statute. That power having been exercised the carrier has no right to complain.

In the present case, claimant having agreed to perform service under "conditions prescribed by law," there is no reservation of right to change except within the law. Should it be argued, and we must be understood to concede the point only *in arguendo*, that the contract contemplated that change in the statute should consequently change the terms of the contract, the present case is unaffected. The terms of the contract remained the same until August 24, 1912. The rights of the parties as to any act under the contract effected before that time were fixed by the contract then existing. Under a contract a party must be able to know certainly the results of performance, or deviation therefrom, or any act done under the contract. The results must be fixed by the contract at the time of the act.

So, in the present case, the Missouri, Kansas & Texas Railway knew when it discontinued its fast train that the Postmaster General had a right to divert the mails from that

route. It knew that subsequent to the diversion he had a right to reweigh the mails on any route affected by the diversion for not less than ninety working days and to establish new rates of pay on the basis of the new average daily weight. The Postmaster General knew he had the same rights. That is why a contract was made, so both parties might know the consequences of contemplated acts.

Even though, then, the contract was changed on August 24, 1912, it could not change the results of any act performed before that date. So far as it attempts to do so it violates the contract existing when the act was performed and is therefore invalid and unconstitutional under the authorities we have cited above.

The court is not now called on to decide whether a readjustment in accordance with the terms of the act might be made for a diversion occurring AFTER August 24, 1912, when the act was approved. The diversion here occurred BEFORE that date, and there is no question that under the contract then existing a readjustment on a weighing of all the mails on the route for ninety days was the only one legally possible.

III.

The act of August 24, 1912, only authorized the Postmaster General to act when the diverted mails equalled at least 10 per centum of the average daily weight on any of the routes affected, and it was error to sustain his exercise of power in weighing mails in November, 1912, to ascertain weights diverted in January, 1912.

Giving full effect to the act of August 24, 1912, as applicable to this contract, it must nevertheless be clear that the Postmaster General could not exercise an arbitrary power under its terms, but can and should be required to act in accordance with the plain provisions of the law.

Congress said when mails are diverted a readjustment of pay might be made provided the weight of the *diverted* mails equalled at least 10 per centum of the daily average weight carried.

Every report of the Postmaster General states a normal average increase in the weight of mail of from 7 to 12 per centum and it is manifest on its face that the mails carried in November, 1912, were considerably heavier than in January of that year. When, therefore, the Postmaster General weighed the diverted mails in November, 1912, he did not and could not certify that they were more than 10 per centum of the daily average weight in January when the diversion was actually made. By the method adopted the Postmaster General not only weighed a large growth of diverted mails, but applied the result to a daily average ascertained nearly three years prior, or in February, 1910. To merely state the proceeding is enough to demonstrate its unfairness and its disregard of the plain purpose of Congress as expressed in the act.

IV.

The act does not authorize a weighing of diverted mails only.

There is a serious question which we consider it our duty to present to the court, whether the act of August 24, 1912, contemplated a weighing of diverted mails only.

The provision in question reads:

> "*Provided*, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected; *provided, further*, that readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve."

A very patent ambiguity at once appears—that is, the words "such mails" refer to the "mails" which have been weighed "for the purpose of readjusting their compensation on a railroad route" or "mails" which "are diverted therefrom or thereto."

An ambiguity thus appearing, we are justified in applying the rules of construction, one of which is that repeal by implication is not favored. As the Supreme Court says, in Frost *vs.* Weine, 157 U. S., 46:

> "It is well settled that repeals by implication are not favored. And when two statutes cover in whole or in part the same matter and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both."

And again, in Wilmot *vs.* Mudge, 103 U. S., 217:

> "The rules of construing statutes in like cases with the present are so well understood as to need no citation of authorities.
>
> "They are first, that effect shall be given to all the words of a statute, where this is possible without a conflict; and, second, that as regards statutes in *pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted."

In the present case the provision repeals to some extent the provision of the act of 1905 that readjustment is in all cases to be had on the basis of a reweighing for not less than ninety days.

> "That hereafter before making the readjustment of pay for transportation of mails on railroad routes,

> the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Repeal by implication not being favored, the repeal must be limited to the parts absolutely irreconcilable—that is to say, the requirement of a weighing period of not less than ninety days.

It is a reasonable construction to the present provision to hold it to mean that in case of diversion the Postmaster General need not weigh the mails on the routes affected for ninety days, but only for such number of days "as he may determine." There is no express or necessarily implied repeal of the provision of the Act of 1905 that readjustment shall be on the basis of the average daily weight, to be ascertained in every case by the actual weighing of the mails on the route.

This leads us to the application of another rule of construction mentioned above, namely, that in a series of statutes in *pari materia* similar words will be construed to have a similar meaning.

Wilmot *vs.* Mudge, *supra.*

An early expression of the rule is in United States *vs.* Freeman, 3 Howard, 556, at page 564:

> "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration, in construing any one of them, and it is an established rule of law, that all acts, in *pari materia*, are to be taken together as if they were one law. * * * If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute. * * * and if it can be gathered

> from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

Now the provision in the case at bar provides no readjustment may be made "unless the diverted mails equal at least 10 per centum of the average daily weight on any of the routes affected."

The Postmaster General surely cannot ascertain whether the diverted mails equal 10 per centum of the average daily weight unless he knows what the average daily weight is. The words "average daily weight" must here mean what they have been stated in former statutes to mean, namely, the average daily weight "ascertained by the actual weighing of the mails." It was impossible, then, without weighing all the mails on the route, for the Postmaster General to know whether the diverted mails equalled 10 per cent thereof.

The Postmaster General, moreover, in stating the readjusted compensation, stated it as based on a "new average daily weight" (Report P. O. Dept.). As no average daily weight can be fixed except by actual weighing of the mails on the route, there was no new average daily weight to use as a basis for readjustment.

It is unreasonable to suppose that Congress intended to measure the percentage of mail diverted in 1912 by an average daily weight found in 1910. It is well known that the weight of mail carried on a route changes during the four-year term usually by a gradual increase. To find, then, that the diverted mails in 1912 equalled 10 per cent of the weight found in 1910 on a route is no indication that the diverted mails equalled 10 per cent of the mail carried in 1912.

The Postmaster General's construction of the law as requiring weighing of diverted mails only leads to the absurd result that after a diversion a route's pay might be reduced even

though it was still carrying a greater weight of mail than the weight carried in 1910 upon which the adjustment of compensation was based.

Suppose a route to have carried 10,000 pounds daily average mail in 1910, on which its compensation for the four-year period was based.

If the weight of mails increased at the rate of 8 per cent a year, not an abnormal increase, it would in 1912 have been carrying 11,600 pounds. If subsequent to the diversion it was found that the mails diverted weighed 1,500 pounds, this would exceed 10 per cent of the average daily weight in 1910 as well as in 1912. The pay would be then readjusted on a basis of 8,500 pounds, although the road was actually carrying in 1912 10,000 pounds, or more than it was being paid for. We cannot credit Congress with having contemplated such an injustice. If all the mails on the route had been weighed, the results would have shown no basis for reduction and the carrier's pay would have remained the same, a condition of which it would not complain.

A further injustice in the Postmaster General's method was to weigh in November and December, 1912, mails diverted in January and April. Between the diversion in April and the weighing in November seven months elapsed, during which time the diverted mails by a normal increase of 8 per cent annually (for example) would have increased over 4 per cent. It was obviously impossible for the Postmaster General to ascertain by weighing certain mails in November whether like mails in April equalled 10 per cent of the mails carried on the routes from or to which diversion was made in 1910 or in 1912.

This is what he has tried to do. The statute by its terms forbids readjustment unless the diverted mails equal 10 per cent of the average daily weight. The weight of diverted mails could only be ascertained immediately after the diversion; any number of extraordinary circumstances besides normal increase might intervene to make a very different

weight of mail seven months later between the same points.

It was, therefore, impossible for the Postmaster General under the method he here pursued to fulfill even his own construction of the statute.

The Postmaster General's construction of the statute leads to injustice and absurdities. His action under it could not possibly result in a compliance with its terms. The conclusion is inevitable that Congress intended by the provision to allow the Postmaster General to make readjustments following a diversion on a weighing of all the mails on the routes affected for any period he might determine, subject to the limitation that he might make such readjustment only when the diverted mails equalled 10 per cent of the total mails then carried on the route.

Of course if the Postmaster General misinterpreted the law and his action did not comply with it, the rights of the carriers were not affected. As the Supreme Court said in the Chicago & Northwestern case, *supra:*

> "Of course if it was not the intention of the acts of Congress referred to to affect the contracts of the company, the erroneous interpretation of them by the Postmaster General and his action under it cannot give to them any different effect, for the rights of the parties depend on the law itself."

V.

No readjustment could be effective till the order was issued.

If the court should hold that the railroads had no contract for carrying the mail, or that they had a contract terminable by the Postmaster General at any time by a new offer of compensation which automatically put the railroad on its election either to discontinue the service or to accept the new terms, however unconscionable they might be, it may be that the railroads cannot here recover in full. We

can conceive of no other view of their relation to the Post Office Department which could preclude their full recovery in the present case.

In such a view, however, the railroad is not put upon its election until the new offer of compensation is made. It cannot know whether the proffered rate is advantageous or not until it is made.

In the Delaware, Lackawanna & Western case, *supra*, the law changing rates was passed March 2, 1907, to be effective, July 1, 1907. The orders readjusting pay on the basis of the new rates were issued September 12, 1907. Though by the terms of the law the Postmaster General was to "readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven," the Court of Claims there held:

> "It appears, however, that the orders and notices under the act of 1907 were issued on September 12, 1907, at the rates stated in the readjusting orders and notices. We think it was entitled to receive the rates fixed by the 1905 orders until they were changed by the Postmaster General as directed by the act of 1907, and thereafter to be paid under the new rates. The difference between the two rates up to September 12 was $698.39 and for this difference plaintiff should have judgment."

In the present case the equities demand even more strongly that the readjustment, if valid, should not be effective till the issuance of the orders. In the Delaware, Lackawanna & Western case there was a mere flat percentage reduction. There was no reweighing and no new basis of computation. The claimant was aware from the moment of the passage of the act what the new rates would be if applied to its routes; it might, therefore, have exercised its option to refuse service on July 1st.

In the present case there was no change of rate as such, but a weighing of some mails never definitely identified,

none of it taking place on claimant's lines. Claimants had no way of knowing or even estimating prior to the issuance of the orders what the rates would be. The orders did not issue until February 21, 1913, on five routes and on one route not until March 6, 1913. The roads were paid at the new rates from July 1, 1912. The difference between the old and new rates for that period is, on the Missouri, Kansas and Texas, $3,025.41, and on the Missouri, Kansas and Texas of Texas, $2,899.69.

Conclusion.

The is no doubt here that claimants should recover. The only question is as to the amount.

If the court believes the claimants had four-year contracts based on existing law when the contracts were made, claimants must recover the full amount.

If the court believes the claimants had contracts based on the statute and existing unchanged until the statute was changed, the claimants must recover in full.

If the court believes the statute (act of Aug. 24, 1912) did not authorize readjustments upon weighing of diverted mails only, the claimants must recover in full.

If the court believes the Postmaser General could not ascertain in November whether mails diverted in January or April equalled 10 per cent of the mails carried in April, the claimant must recover in full.

If the court believes the claimants had no contractual rights except to accept an offer of new compensation or refuse to carry the mails, the claimants must nevertheless recover the difference between the rates till the orders of readjustment were issued.

Respectfully submitted,

ALEXANDER BRITTON,
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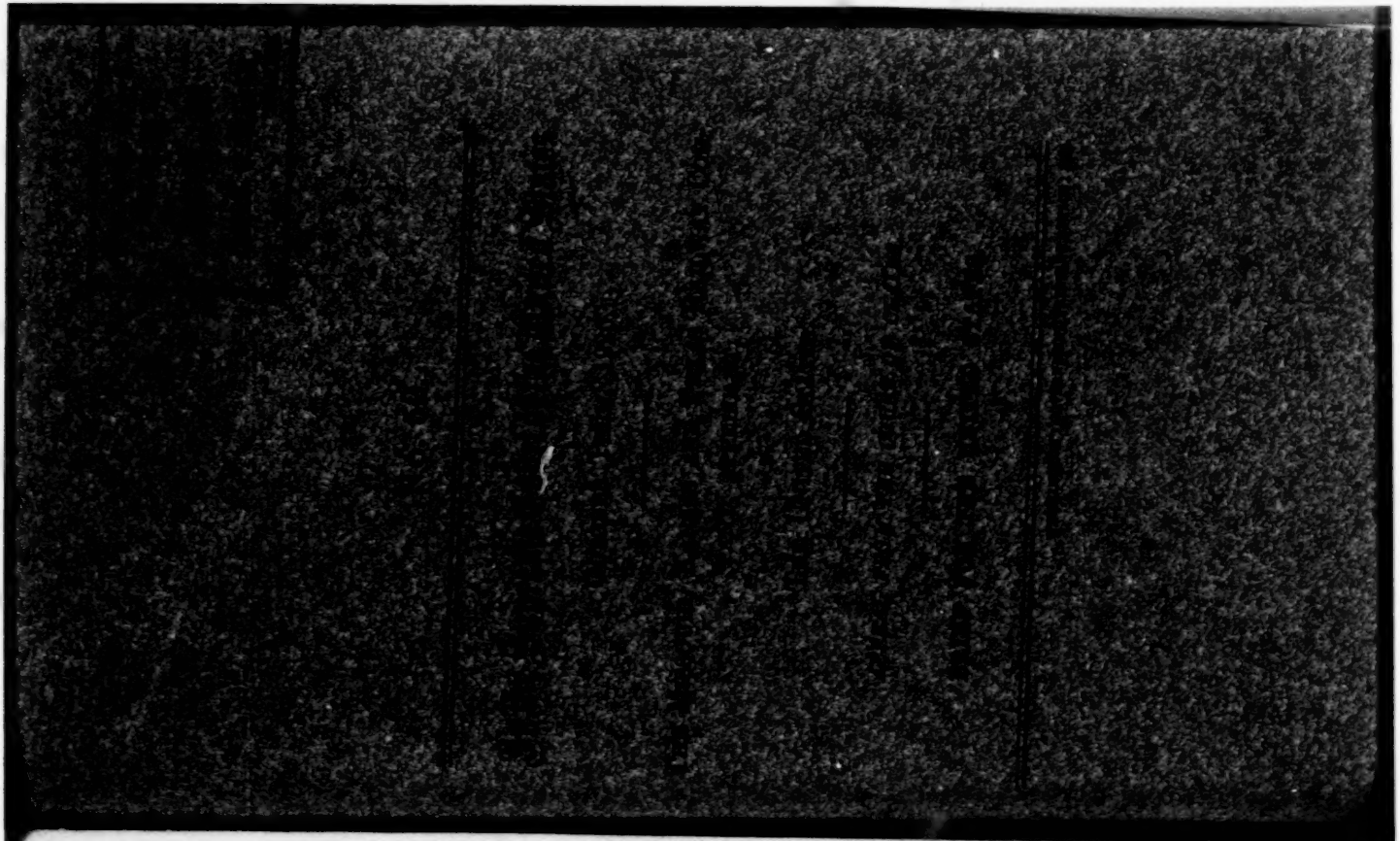

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE MISSOURI, KANSAS AND TEXAS Railway Company, appellant, *v.* THE UNITED STATES. | No. 52.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by The Missouri, Kansas & Texas Railway Company from a judgment of the Court of Claims dismissing the petition.

Prior to July 1, 1906, the appellant operated a system of railroad lines between points in Kansas, Missouri, Oklahoma, and Texas. In the month of January, 1906, it notified the Post Office Department that a fast mail service would be established on its railway system, leaving Parsons, Kans., daily and protecting a connection at Vinita, Okla., with a similar train of the St. Louis & San Francisco Railroad Company, and proceeding south to Taylor, Tex., there overtaking appellant's train No. 5, which

would proceed to Houston, Galveston, and San Antonio, Tex. The appellant submitted and filed, together with the Frisco System, the time table affecting said road and the fast mail trains with the Second Assistant Postmaster General (R. p. 14).

Thereafter, and in March, 1906, the appellant and the St. Louis & San Francisco Railroad Company notified the Second Assistant Postmaster General that the new mail train service would "positively be maintained during the period of four years commencing July 1, 1906." This official guaranty was predicated on a continuance of the then rates and regulations affecting compensation and that in the event of a change only would the railroad companies depart from this guaranty. The Post Office Department replied to this representation through the Second Assistant Postmaster General, stating that the department understood that the statement relative to the installation of fast mail service was in confirmation of previous statements made by the officers of the company relative to the establishment of such service.

The appellant transported mail over authorized routes under the terms of a readjustment of compensation which were to expire on June 30, 1910. In anticipation of that fact the Post Office Department sent "distance circulars" to appellant which it was requested to fill out with certain information and return to the Second Assistant Postmaster General. Among other things, it was requested that the appellant send two copies of its "latest working

schedule showing the trains operated over each of its postal routes." (R. p. 10.) The appellant represented in the circular that Vinita, Okla., was a railroad station on its route where mails were exchanged. (R. p. 12.)

On or about June 30, 1910, appellant returned the distance circulars to the department together with data in respect of route 153010, Kansas City to Denison, Tex., and route 153016, Parsons, Kans., to Oklahoma City, and route 155098, Sedalia, Mo., to Parsons, Kans. The circulars so returned and signed by the proper officers of the appellant contained this clause:

> The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service. (R. p. 10.)

The appellant appended to the distance circulars an additional statement "protesting against regulations and practices of the department." (R. p. 11.)

Thereafter on June 30, 1910, the Second Assistant Postmaster General in acknowledging receipt of the distance circulars, stated to appellant that note was taken of the modification made by the company in the agreement clause by which it excepted certain orders of the department and entered

> protest against other rules, regulations, or requirements of the Department with respect to the performance of service. (R. p. 12.)

and that—

> the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that in the performance of service from the beginning of the contract term above named, and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of this service. (R. p. 12.)

After the appellant had replied to the notice of the Second Assistant Postmaster General, dated June 30, 1910, the letter, on August 12, 1910, again referred to this same matter in a letter of that date, addressed to appellant, wherein the Second Assistant Postmaster General stated—

> I have to advise you that, in the performance of service on this route (153010) from the beginning of the contract term named and during the continuance of such performance of service, it must be understood that your company will be subject, as in the past, to the usual customs and practices in relation to railroad mail service as well as to the conditions stated in my letter of June 30, 1910. (R., p. 12.)

After the Postmaster General had caused the mails to be weighed on the aforementioned routes, prior to July 1, 1910, and the average daily weight thereon computed, in accordance with the custom of the

department to weight the mails transported by the railroads once in every four years, and to base compensation for such transportation on the average weights of mail so ascertained, that officer in September, 1910, issued an order authorizing appellant to transport the mail on said routes at the rates stated in the several orders applicable to each of the routes. The adjustment so made covered the period from July 1, 1910, to June 30, 1914—

> Subject to future orders, and to fines and deductions, and is based on a service of not less than six round trips per week. (R., pp. 12, 13, Finding III.)

Notice of such readjustments of pay was sent to appellant, which continued to carry the mails on the fast mail train service which had been theretofore established on July 1, 1906, and on other available trains for that purpose. (R., p. 13.)

Thereafter and in January, 1912, the appellant withdrew its fast mail trains on route 153010 and there was a total discontinuance of the mail service on said trains which broke the connection at Vinita, Okla., with the fast mail trains of the St. Louis & San Francisco Railroad Company. As a consequence a large volume of Texas and Oklahoma mail was delayed. As a result, also, of the withdrawal of appellant's fast mail trains, mail, which had theretofore been diverted from other lines to those of the appellant and for which it had received credit by reason of the establishment of its fast mail train service inaugurated on July 1, 1906, was distributed

to or carried over other railway postal routes. (R., p. 15, Finding VI.)

At the time appellant's pay was readjusted from July 1, 1910, it did not notify the Post Office Department that its fast mail train service would be discontinued at any time during the four-year period beginning July 1, 1910. When the appellant withdrew its fast mail train service in January, 1912, it was notified by the Post Office Department that such action would be regarded as a violation of the contract and would subject the company to a penalty. The appellant denied any obligation on its part to operate its fast mail train service. (R., p. 15.) Because of appellant's action in discontinuing its fast mail train service the Post Office Department was obliged to provide for a redispatch of the mails in question over other lines and routes. This was done in March, 1912. (R., p. 15, Finding VI.)

The act of Congress, approved August 24, 1912 (37 Stat. c. 389, pp. 539, 554, sec. 4), making appropriations for the Post Office Department, provided—

> SEC. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to

> him as in other cases, and readjust the compensation on the routes affected accordingly: *Provided*, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: *Provided, further*, That readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve.

The foregoing section was enacted to clarify questions of practice and to confer specific authority upon the Postmaster General in dealing with a situation where mails are diverted from one route to another during the period for which the railroad may have been authorized to transport the mails.

On November 22, 1912, the Second Assistant Postmaster General notified the Railway Mail Service to weigh certain mails for the purpose of ascertaining the amount of mail that had been diverted to other lines by reason of appellant's discontinuance of its fast mail trains in January, 1912. The instructions were—

> To weigh only such mails as might be definitely identified as having been formerly carried on said routes, and in case of doubt the mail should not be weighed, and the plaintiff (appellant) was advised of the action taken and that a readjustment of pay from July 1, 1912, would be based thereon. (R. p. 16.)

After the average daily weights of the diverted mails had been ascertained, and on February 21, 1913, an order was issued by the Postmaster General readjusting appellant's mail pay from July 1, 1912, on the basis of the weight of the diverted mail caused by the withdrawal of appellant's fast mail service. As a result, appellant's compensation on route 153010 was restated and decreased annually $10,914.04. On routes 153016 and 155098, also operated by appellant, an increase was allowed of $581.06 and $5,846.31, respectively. (R. p. 16.) The diverted mails which gave rise to the readjustment equalled more than 10 per centum of the average daily weight of mail to be carried on any of the routes thereby affected. (R. pp. 16, 17, Finding VII.)

The appellant received notice of the readjustment of compensation and protested against the same, to which the Second Assistant Postmaster General, on March 10, 1913, replied as follows:

> Note is taken of your statement that your company protests against the readjustment of pay on the routes referred to without a reweighing of all the mails handled on such routes and "declines to accept the compensation proposed in your letter of the 21st instant. The department is hereby notified that this company will expect compensation under the last quadrennial weighing until such time as all of the mails handled on such routes are again weighed in accordance with the laws governing same." In reply to this your attention is invited to the express language of

section 4 of the act of August 24, 1912, which provides for a "weighing of such mails" as have been diverted. The act does not contemplate a weighing of all the mails carried on the routes affected, but merely of the diverted mails. Referring to your statement that your company declines to accept the compensation stated in the adjustment orders, I have to say that such compensation is the maximum that will be paid for service on the routes in question, and the receipt by your company of such compensation is regarded by the Post Office Department as full payment for service rendered.

With respect to your statement that it can not be determined whether the diverted mails represent 10 per cent of the average daily weight on any route without weighing all of the mail on such route at the same time the diverted mails are weighed, I have to say that this apparently proceeds upon the theory that the law contemplates that the diverted mails shall equal 10 per centum of the average daily weight of each of the routes affected before a readjustment thereon is authorized by the law. The department construes the law to mean that before a readjustment on the routes shall be made it is only necessary that it be determined that the diverted mails equal at least 10 per cent of the average daily weight of any one of the routes involved in the diversion, notwithstanding the diverted mails may not equal 10 per cent of the average daily weight of every route affected.

> With this understanding of the department's construction of the law it is not believed your company will insist that the adjustment was made in violation of the law. (R. pp. 16–17, Finding VII.)

On March 25, 1913, appellant informed the Post Office Department that warrants covering its mail pay would be accepted under protest. (R. p. 17.)

On April 12, 1913, the Second Assistant Postmaster General replied that the compensation stated in the readjustment orders referred to was the maximum that would be allowed for service on the routes covered, and that the receipt by the company of such compensation was regarded by the department as full payment for services rendered thereon. (R. p. 17.)

The appellant continued to carry the mails after receipt of the last-named letter of the Second Assistant Postmaster General, and was paid the compensation fixed by the order of February 21, 1913, readjusting its mail pay.

By reason of the discontinuance of appellant's fast mail trains on July 1, 1912, and the consequent diversion of mails to other lines, readjustments of pay on such lines of railroads were made contemporaneously with the readjustment of appellant's compensation, all of which was made necessary by reason of the impairment of mail service caused by appellant's discontinuance of the kind of service which was in operation at the time it was originally authorized to transport the mail. The net result

of adjustments affecting other lines of railroad mail service was an increase in total pay of all roads concerned of $11,727.34 per annum. (R. p. 17, Finding VIII.)

The appellant's contention in substance is—

That its contract with the Government was for a period of four years from July 1, 1910, and was not subject to change by the Postmaster General during the said period.

That if the statute of 1912 changed the contract, it did so only as to future diversions.

That the mails were diverted by appellant in January, 1912, and the Postmaster General was not authorized to weigh the mails in November, 1912, for the purpose of ascertaining the amount theretofore diverted in connection with the readjustment of compensation.

That the act of 1912 does not authorize a weighing of diverted mails only.

That no readjustment could be effective until the order was issued.

The Government maintains—

1. The contract between the Government and appellant, although the pay was readjusted for four years, was terminable at the will of either party, and was subject to reservations by and in behalf of the Postmaster General.

2. Appellant impaired the character of the service which it had contracted to perform for the rate of compensation fixed by the original readjustment

order. Thereupon appellant became subject to the remedies provided in section 3962, Revised Statutes, section 7450, Compiled Statutes, also to the act of August 24, 1912, c. 389, 37 Stat., 539.

(*a*) The Postmaster General's remedy under Revised Statutes, section 3962, Compiled Statutes, section 7450, and the act of August 24, 1912, c. 389, 37 Stat., 539, 554 was applicable to the delinquency in question.

(*b*) Appellant was free to decline to carry the mails under the readjusting order and having carried them is bound by the terms of pay fixed thereby.

3. The act of August 24, 1912, was remedial and the Postmaster General's procedure thereunder was authorized thereby and did not violate any contract rights of appellant.

(*a*) The Postmaster General was authorized to weigh only the diverted mails to ascertain the effect of appellant's acts in impairing the service.

(*b*) The readjustment was properly made from July 1, 1912.

ARGUMENT.

I.

The contract between the Government and appellant, although the pay was readjusted for four years, was terminable at the will of either party, and was subject to reservations by and in behalf of the Postmaster General.

Appellant's principal contention is based upon the proposition that the contract between the Government and the railroad company was a four-year express contract the terms of which were fixed for the period from July 1, 1910, to June 30, 1914, and, therefore, that the Postmaster General had no power to make the order reducing the pay, as was done in 1912. Appellant claims that the Postmaster invited the railroad to offer service by sending it the distance circular, and by signing and filing the circular the railroad agreed to perform the service and stated its terms, which thereby became fixed contract terms for the period. Upon this theory of the contract appellant's right of recovery rests.

This same question has been presented to this court, as well as to the Court of Claims, a number of times over a period of many years and has been uniformly decided against the theory of the appellant herein.

The Postmaster General sent to the railroad company the usual distance circular in 1910 with request that it be filled out with certain information called for thereby and returned to the department. There

was a form on the distance circular containing an agreement clause to the effect that the company named agreed to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to railroad mail service. (R., p. 10, Finding II.) The railroad company filled out the distance circular, signed the agreement clause, with certain exceptions not necessary to mention here, and returned it to the department. This was all preliminary to the weighing of the mails upon the routes in question and the readjustment of pay stated by the Postmaster General thereafter.

The return of the distance circular with the agreement clause could not in itself constitute a contract. It was in effect an application by the railroad for the service and the orders of the Postmaster General which followed the receipt of the circular, the weighing, and the ascertainment of the average daily weight, were in effect offers of business at the prices named therein. The terms of the contract therefore are not to be found solely in the agreement clause affixed to the distance circular, but are to be ascertained as well from the terms of the orders of the Postmaster General.

The Government maintains that (*a*) the relation existing between the Government and the railroad company, appellant, was for service terminable by either party, and (*b*) that such contract as existed between the parties was subject to the specific reservation made by and in behalf of the Postmaster

General in the readjustment orders stating the pay for the new term beginning July 1, 1910, and that he acted under that reservation properly by issuing the order restating the pay from July 1, 1912.

The specific reservations were that the readjustment of pay was stated for the period named "unless otherwise ordered" and "subject to future orders and to fines and deductions." (R., p. 13, Finding III.)

The principles relied upon here by the Government have been stated in the following cases:

The nature of the contract relations arising under the state of facts existent in this case first came before this court in the case of *Eastern Railroad Company* v. *The United States*, 129 U. S. 391. It was there held that there was no contract to carry the mails for a period of four years at fixed rates, and that the reservation "unless otherwise ordered" in the order fixing pay opened the way for the Postmaster General to exercise the authority conferred and conformed with the direction of the statute of 1878 to reduce the pay. (P. 295.)

Again, in the case of the *Minneapolis & St. Louis Railway Company* v. *The United States*, 24 Ct. Cls. 350, 360, the court with great clearness stated the nature of the contract as follows:

> The voluntary compliance with the requests contained in the weight and distance circulars sent out by the Postmaster General was an application for the service of carrying the mails by the claimant corporation, and the orders of

> the Postmaster General were offers of business at the prices therein stated. Those orders and the business were subject to the provisions of the statutes and the general regulations of the Post Office Department, which the parties were bound to know, as well as to the usual and ordinary customs and practices of the department in relation to railroad mail service, with which all persons engaged in that service are presumed to be familiar. All these taken together constituted the terms of the offers, and the claimant, by taking and carrying the mails, accepted those terms.

Again, in the case of *Atchison, Topeka & Santa Fe Railway Company* v. *The United States*, 225 U. S. 640, this court sustained the action of the Postmaster General in stating the pay for railway post-office car service at less than the maximum rate during a four-year period or term, contrary to the assumption by appellant here that the distance circular created a four-year contract on terms unchangeable by the Postmaster General.

Again, in the case of the *Delaware, Lackawanna & Western Railroad Company* v. *The United States*, 249 U. S. 385, this court, affirming the judgment of the Court of Claims, held that the orders of the Postmaster General and notices fixing the compensation for the quadrennial period at certain rates but "subject to future orders" and "unless otherwise ordered" did not guarantee the railroads against any change of the rates during that period.

Again, in the *Mail Divisor Cases*, 251 U. S. 326, it was said by Justice Pitney and concurred in by Justice McKenna:

> I concur in the view of that court (53 Ct. Cls. 258, 308, 315, 318, 319) that the contract arose not out of the distance circular, * * * but arose out of what subsequently happened. (P. 339.)

Again, in *Schaff, Receiver, Missouri, Kansas & Texas Railway Company* v. *The United States*, 55 Ct. Cls. 405, the same contention was made by the claimant that it had a contract for four years at the rate of compensation named in the adjustment order, without the right in the department to diminish the rate during the period. The court held that the facts completely negative the contentions as to the character and terms of the contract and leave the case on all fours with the case of the *Delaware, Lackawanna & Western Railroad Company, supra.*

The cases relied upon by appellant in support of the contention that the distance circular created the contract do not bear out that theory. They are quite dissimilar from the cases hereinbefore cited. Reference will be made to them here briefly.

The case of *Union Pacific Railway Company* v. *The United States*, 219 Fed. 427, relied on by appellant, does not have the effect attributed to it. The point was not directly in issue in that case. The question involved related to the right of the Postmaster General to make certain deductions from the railroad's mail pay on account of the loss of regis-

tered mail and mail equipment by the railroad company; and it was held that the Government could not maintain the suit to recover damages because the matter had been previously settled by the Post Office Department by the imposition of fines and making deductions from the road's mail pay.

The case of the *Great Northern Railway Company* v. *The United States*, 236 Fed., 433, from which appellant quotes on pages 8 and 9 of its brief from the court's opinion is not similar to the instant case. Upon a careful examination it will be found that the specific contention of plaintiff in the instant case was not involved there, and, furthermore, it is clearly evident that the dictum cited from the opinion of the Circuit Court of Appeals was based upon a misapprehension of the authorities upon which it relies.

That case was one where the railway company brought suit to recover the amount of a fine stated and deducted from the company's compensation during one quadrennial term for a delinquency which occurred during the preceding quadrennial term. From the language of the opinion it appears that counsel for the United States had suggested that the contract was a continuing one and had been entered into long prior to the beginning of the quadrennial term during which the deduction was made. (P. 437.) The court held that there was a new contract beginning with the four-year term and that the terms of the contract were expressed by the Postal Laws and Regulations (to which the railroad company

had agreed to be subject by signing the agreement clause on the distance circular), and the long-established practice with reference to making deduction. However, the language which was otherwise used by the court goes further than the necessities of the case and is, therefore, *obiter dictum*. It is this language which the plaintiff quotes and relies upon and is to the effect that the contractual relations were established by the distance circular and its acceptance, and constituted a contract with terms fixed for four years. (P. 437.) This finding was entirely unnecessary for the purposes of the *Great Northern Railway Company's case*, and when the language is examined and it is found that the court relied upon the *Chicago & Northwestern Railway Company case* (104 U. S. 680), which it cites in connection with that part of its opinion, it will be seen that the court felt constrained to apply the Supreme Court's language to the case before it and overlooked the fact that the character of the contract in the *Chicago & Northwestern case* was entirely different from the character of the contract in the case before it. In the *Chicago & Northwestern case* the parties had entered into a formal time contract reduced to one instrument of writing with terms fixed for a period of four years. This was the character of contract which preceded the practice followed later when such contracts were abandoned and the relations between the railroads and the department were expressed by the distance circular, the correspondence, the orders of the Postmaster General fixing pay, and

the acceptance and performance of the service by the companies thereunder. How completely the Circuit Court of Appeals was misled in that respect is shown by the fact that the first paragraph quoted by appellant herein from the *Great Northern case* and upon which appellant relies was copied verbatim from the opinion of the Supreme Court in the *Chicago & Northwestern Railway Company case*, omitting and paraphrasing a few immaterial words. (P. 685.)

The *obiter dictum* of the *Great Northern Railway case*, relied upon by appellant, is directly at variance from the decisions of this court on the point involved here. (*Eastern Railroad Company* v. *The United States*, 129 U. S. 391, 396; *Delaware, Lackawanna & Western Railroad Company* v. *The United States*, 249 U. S. 385; *New York, New Haven & Hartford Railroad* v. *The United States*, 251 U. S. 123; the *Mail Divisor Cases*, id. 326.)

Appellant specially relies upon the case of *Chicago & Northwestern Railway Company* v. *The United States*, 104 U. S. 680. In that case, however, the facts were radically different from the facts in the instant case. There was a formal written contract between the parties by which both were bound for a period of four years in all events and neither could change the effect of the obligation so entered into without the consent of the other. It was a case where the contract obligated the railroad company to perform for the period stated and the Government was bound to pay at the rate named for the term.

In the instant case there was no formal contract for a period of four years. The contract relations were evidenced by the several steps, including the distance circular, the readjustment order, and notice to the company stating pay and the acceptance of service by the railroad company, as we have seen hereinbefore. There was no obligation upon either party to perform or pay for a definite period without power to change. The service was voluntary and the pay could be changed at any time under the reservations made by the Postmaster General. This change in the contract regulations came about soon after the act of 1873, when many railroads declined to enter into an absolute and unyielding contract for a period of four years, and thereupon the service was authorized, performed, and paid for in accordance with the practice hereinbefore described.

It needs no further argument to refute the contention of appellant as to the nature of the contract and to sustain the Government's contention that the contract relations were terminable at the will of either party; and that the Postmaster General had made specific reservations in the language referred to contained in the adjustment orders and which left it open to him to restate the rate of compensation as he might see fit during the contract period. The right of the railroad to continue or to cease service under those orders and the effect of a continuance will be referred to hereinafter.

II.

Appellant impaired the character of the service which it had contracted to perform for the rate of compensation fixed by the original readjustment order. Thereupon appellant became subject to the remedies provided in section 3962 Revised Statutes, section 7450 Compiled Statutes, also to the Act of August 24, 1912, c. 389, 37 Stat., 539.

The facts are undisputed that for four years preceding the quadrennial term in question the plaintiff was operating certain fast mail trains by reason of which large weights of mails had been attracted to its lines and for which it was receiving compensation; that it did not withdraw said trains prior to the beginning of the new contract term in 1910, but continued them and received the credit for their weights during the weighing period; that the pay for the quadrennial term beginning July 1, 1910, included pay for the weights of mails carried on such special mail trains; that the plaintiff continued the operation of said trains until 1912; and that it then, against the protest of the Postmaster General, arbitrarily withdrew said trains, causing a necessary diversion of a large amount of mails from its lines to other lines which could carry them on better schedules thereafter.

When the Postmaster General stated appellant's pay beginning July 1, 1910 (with the reservations hereinbefore mentioned), acting under Revised Statutes,

section 4002, Compiled Statutes, section 7483, he took into consideration many other factors, one of which being the "due frequency and speed" of the service then in existence and in respect to which the appellant had submitted its working schedule showing the trains then in operation. The fast mail trains in question had been previously installed with the assurance of their continued operation provided the rate of pay then effective was continued. Under the original orders appellant was allowed the maximum rates permitted by law from July 1, 1910.

Without any previously disclosed purpose to curtail the service, appellant, in January, 1912, discontinued two fast trains on one of its routes, which drew a notice from the Second Assistant Postmaster General that such action would be regarded "as a violation of the contract," which would subject the company to a heavy penalty. Notwithstanding such notice appellant withdrew or neglected to restore the former service. The result was delayed mails and a consequential diversion of a large volume of mail otherwise destined to points on appellant's routes to other lines, increasing the normal burden thereon and decreasing the burden theretofore assumed by appellant. After an investigation the Postmaster General readjusted mail pay on all the routes affected in proportion to the service thus required by the misconduct of appellant.

Appellant's action in withdrawing the special fast mail trains changed the conditions of the service performed by it and for which it had been allowed a

definite rate of pay. This delinquency warranted the Postmaster General in dealing with the situation according to the facts.

(a) The Postmaster General's remedy under Revised Statutes, section 3962; Compiled Statutes, section 7450; and the act of August 24, 1912, c. 389, 37 Stat. 539, 554, was appliable to the delinquency in question.

The contract between the Government and appellant was specifically made subject to the provisions of Revised Statutes, section 3962; Compiled Statutes, section 7450; and the terms named by the Postmaster General preceding the issuance of the adjustment orders notified the plaintiff that in the performance of service it would be subject "to all the postal laws and regulations which are now or may become applicable during the term of this service." The provisions of Revised Statutes, section 3962, and Compiled Statutes, section 7450, read as follows:

> The Postmaster General may make deductions from the pay of contractors, for failures to perform service according to contract, and impose fines upon them for other delinquencies. He may deduct the price of the trip in all cases where the trip is not performed; and not exceeding three times the price if the failure be occasioned by the fault of the contractor or carrier.

The Postmaster General was authorized by statute and warranted by the terms of the contract therefore to impose fines or make deductions for the failure on the part of appellant to transport the mails upon the schedules represented and in accordance with the service for which the compensation of July 1, 1910, had been

fixed. The courts have sustained this right as exercised by the Postmaster General in cases where the mails have not been transported upon the ordinary schedule time (*Kansas City Southern Railway Company* v. *The United States*, 252 U. S. 147; *Louisville & Nashville Railroad* v. *The United States*, 53 Ct. Cls. 238), and even though such failure was due to unavoidable causes (*Chicago, Milwaukee & St. Paul Railway Company* v. *The United States*, 127 U. S. 406).

For a clear rule or direction as to the manner of proceeding in readjusting the pay on all mail routes affected by a diversion of mails, Congress enacted section 4 of the act of August 24, 1912 (37 Stat. 539, 554), upon the recommendation of the Postmaster General. This law is as follows:

> SEC. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other cases, and readjust the compensation on the routes affected accordingly: *Provided*, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: *Provided, further*, That readjustment made hereunder shall not take

> effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve.

It is submitted that what the Postmaster General did in November, 1912, in ascertaining the extent and consequence of appellant's misconduct in discontinuing its fast mail trains, and in readjusting appellant's pay in accordance with section 4 of the act of August 24, 1912, was fully authorized by the general postal laws as well as by the act mentioned. The effect of his official action was a deduction in pay for failure to maintain train schedules which delinquency was covered by the laws and regulations in force at the time the default occurred.

It is clear, therefore, that the act of August 24, 1912, was but a confirmation of practices previously authorized by the postal laws and regulations. Obviously, the intent of the act was remedial. It was only cumulative in expressly granting a discretion which might have theretofore been exercised by the Postmaster General. It provided a definite method for ascertaining the extent and consequence of appellant's breach of duty to convey the mails with "due frequency and speed" and because of its failure to maintain the fast mail service in operation when the original orders stating pay were issued.

The Postmaster General was the sole judge of the facts surrounding the delinquency in question. He acted in good faith. No vested right belonging to appellant was infringed.

(b) Appellant was free to decline to carry the mails under the readjusting order and having carried them is bound by the terms of pay fixed thereby.

Appellant was at liberty to discontinue the service or to continue in its performance under the terms named by the Postmaster General in his order readjusting the pay because of the diverted mails. Having elected to continue the service it was bound by the terms named by the Postmaster General. Mere protests without an actual discontinuance of the service availed appellant nothing. (*Eastern Railroad Company* v. *The United States, supra; Delaware, Lackawanna & Western Railroad Company* v. *The United States, supra; Texas & Pacific Railway Company* v. *The United States,* 28 Ct. Cls., 379; *Mail Divisor cases, supra; New York, New Haven & Hartford Railroad Company* v. *The United States,* 251 U. S. 123.)

III.

The act of August 24, 1912, was remedial, and the Postmaster General's procedure thereunder was authorized thereby and did not violate any contract rights of appellant.

From the foregoing considerations it will be evident that no question arises here as to whether the act of August 24, 1912, *supra*, changed the contract between the parties as argued by appellant. The only questions that may properly arise are whether the act done by the Postmaster General was authorized by the statute and did not violate any contract right of appellant.

It has been shown hereinbefore that the nature of the contract between the parties permitted the restatement of the pay by the Postmaster General during the term. The remaining questions therefore will be whether that restatement of pay was warranted by the law and the facts.

(a) The Postmaster General was authorized to weigh only the diverted mails to ascertain the effect of appellant's acts in impairing the service.

Appellant contends that the act does not authorize a weighing of the diverted mails only, but that the Postmaster General should have weighed the entire mails on the route.

Appellant bases this contention upon an alleged patent ambiguity in the language of the act, namely, that it is uncertain whether the words "such mails used in the phrase authorizing the weighing refer to all the mails on the route or the mails diverted."

A reading of the act does not suggest any ambiguity. The meaning is clear and the construction is grammatically correct for the interpretation placed upon the words by the Postmaster General. The history of the legislation shows clearly that the mails referred to were the diverted mails. The subject matter of the legislation is the diverted mails and the antecedent of "such mails" is found in the phrase immediately preceding it, where the diverted mails are referred to.

To support its theory, appellant contends that the act of 1912 repeals to some extent the provisions of the act of 1905 as to the weighing period, and by

citing authorities against repeal by implication, seeks to establish its theory that the act of 1912 did not repeal the provisions of the act of 1905, that all the mails on the route should be weighed to effect a readjustment.

Of course, this is treating the matter wholly from the point of view of the necessities of the appellant's case; but those necessities are in no wise supported by the natural and reasonable construction of the act of 1912. It was a remedial act and not intended to repeal the act of 1905.

Appellant argues further that the Court of Claims erred in sustaining the Postmaster General's exercise of discretion in weighing the mails in November, 1912, by which weighing he reached the conclusion that the diverted mails equaled at least 10 per centum of the average daily weight on any of the routes affected.

The argument is aside from the question inasmuch as the Court of Claims has found as a fact that "the amount of the mails diverted was in excess of 10 per centum average daily weight on some of the routes affected." (R., p. 17, Finding VII.)

However, it may be said that appellant's argument is at fault as it is based upon the assumption that there is a normal increase in the weight of mails after a quadrennial weighing, which, in this case, occurred in the spring of 1910. It is not inevitable that the weights of mail increased during a quadrennial term. They very often decrease on individual routes and

sometimes decrease in a whole section, as was the case in the New England section in 1907 and 1908 during the financial depression. This fact is shown in the anuual reports of the department. No changes, however, are made during the quadrennial term in the statistical basis of average daily weights, nor in the pay allowed, unless a readjustment is ordered. If the appellant's contention in this respect were correct, a railroad company could withdraw its trains with impunity after having their weights credited and paid for, provided the natural growth of the service happened to offset the amount of the diverted mails, notwithstanding the fact that in the contemplation of Congress and the judgment of the Postmaster General such increase in service had been already paid for under the original adjustment order.

Furthermore, appellant's theory overlooks the object of the statute of 1912, which was remediable as to all carrying companies involved. Its purpose was not to penalize the company from which the diversion was made, but it was to enable a readjustment of the pay of all companies involved, equitably reducing the pay of the company from which the mails were diverted and increasing the pay of the company or companies to which they were diverted.

There is nothing in the statutes, nor in the practice or custom of the service which suggests that a comparison should be made with any average daily weight other than that which had been obtained at the beginning of the term and stated at that time.

The statute merely provides that the diverted mails must equal at least 10 per centum "of the average daily weight on any of the routes affected." This clearly refers to the average daily weight stated at the beginning of the contract period. Such weights had been regularly ascertained and stated and the pay fixed thereon for the entire four-year period, "subject to future orders" and the conditions of the contract.

Furthermore, the fact that the Congress intended by the act of 1912 that the diverted mails only should be weighed is shown by its subsequent action upon the recommendation of the Postmaster General. By that action the limitation upon the Postmaster General was entirely eliminated by the repeal of the requirement that the mails diverted should equal 10 per cent. (Report of the Postmaster General for 1915, pp. 28, 67; act of May 18, 1916, section 5, 39 Stat. 161.)

(b) The readjustment was properly made from July 1, 1912.

Appellant argues that no readjustment could become effective until the order of the Postmaster General was issued, that is, from the date of said order. This theory is advanced upon the view that the railroad is not paid upon its election until the new order of compensation is made; that it can not know whether the proffered rate is advantageous or not until it is made.

To support this contention appellant relies upon the case of the *Delaware, Lackawanna & Western*

Railroad Company, supra; but the facts in that case and the language quoted therefrom by appellant are not applicable to the facts in the instant case. In the case relied upon there was a reduction in pay directed to be made by Congress and carried out by the Postmaster General; there was no change in service; there was no impairment of the service by the railroad company; there was no failure of consideration upon which the original pay had been based.

In the instant case the facts are very different. There was a change in the condition of the service and an impairment of it by the act of appellant. There was a part failure of consideration upon which the original pay had been fixed from July 1, 1910. The act of the Postmaster General was an ascertainment of the effect of appellant's delinquency. The measure of the delinquency was fairly ascertained under the direction of the act of 1912 and was otherwise fully justified by Revised Statutes, section 3962, *supra*. In making such ascertainment in accordance with these authorities and direction the Postmaster General did not introduce any new terms into the contract, but merely ascertained and stated the effect of appellant's delinquency. The delinquency occurred with the abandonment of the special mail trains in January, 1912, and continued thereafter over the objection of the Postmaster General and without any effort or endeavor upon the part of appellant to restore the service. It was in existence

on July 1, 1912, from which date the act referred to authorized the readjustment to be made under the special method therein prescribed. The diversion affected a number of lines and routes resulting in readjustments after weighings which were limited to the actual diversion, all doubts being reserved in favor of appellant (R. p. 16), affecting the pay of 39 different routes, the net result of which was an increase of $11,727.34 in railroad mail pay. (R. p. 17, Finding VIII.)

The rights of the Government were involved in the legislation, which was remedial. A remedial statute must be construed liberally so as to afford relief within the power of the court which the language of the act indicates that the legislature intended to grant. The courts will look into the occasion for the passage of such an act and consider the evils which it seeks to remedy, in order to determine whether it was intended to apply to facts which arose in the past as well as those which may arise in the future. The act is not to be construed as operating retrospectively merely because occurrences to which the same is applicable are in part drawn from a time antecedent to the passage of the act (*Johnston* v. *The United States*, 17 Ct. Cls., 157, 171).

CONCLUSION.

From the foregoing it appears—

That the readjustment of appellant's pay by the orders of the Postmaster General was warranted by appellant's delinquency and impairment of the service, for which the original compensation was allowed.

That the readjustment was made in accordance with the reservation in the contract by and in behalf of the Postmaster General, and also in accordance with the Postmaster General's right and duty under provision of law.

That the judgment of the Court of Claims dismissing the petition of the railway company was without error and should be affirmed.

Respectfully submitted.

FRANK DAVIS, JR.,
J. ROBERT ANDERSON,
JOSEPH STEWART,
Special Assistants to the Attorney General.

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MISSOURI, KANSAS & TEXAS RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 52. Submitted April 26, 1921.—Decided June 6, 1921.

1. After a railroad company had entered into a contract to carry the mails with notice that it would be subject to all postal laws and regulations which were or might become applicable during the term of the service and that the adjustment of compensation based on weighings of the mails carried during 90 working days was subject to further orders, as well as fines and deductions, it discontinued an important train and thereby occasioned a diversion of part of the mails to other lines; the Post Office Department, upon the authority of the Act of August 24, 1912, c. 389, 37 Stat. 539, enacted after the contract was entered into, weighed the diverted mails for 21 days and readjusted the compensation accordingly. *Held*, that such readjustment did not violate the contract although it diminished the compensation, and in part retroactively. P. 613. *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 249 U. S. 385; *Mail Divisor Cases*, 251 U. S. 326.
2. The Act of 1912, *supra*, allows the readjustment to be made after a weighing of the diverted mails only, and the proviso (since repealed) that they must equal ten per cent "of the average daily

weight on any of the routes affected," refers to the average daily weight ascertained by the last previous general weighing, and means ten per cent, not upon all, but upon some one, of the routes affected. Pp. 614, 615.

3. The act also allows the readjustment to relate back to the first of July previous to the date of the act. P. 614.

53 Ct. Clms. 641, affirmed.

THE case is stated in the opinion.

Mr. Alexander Britton for appellant.

Mr. Frank Davis, Jr., *Mr. J. Robert Anderson* and *Mr. Joseph Stewart*, Special Assistants to the Attorney General, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a claim for $9,429.92 additional pay for carrying mails between July 1, 1912, and July 1, 1914. The claimant had been transporting them under an adjustment of compensation that expired on June 30, 1910. In contemplation of the usual quadrennial readjustment by weighing, the Postmaster General sent to the claimant the customary form of Distance Circulars to be filled out and to be accompanied by the latest working schedules of trains operated over the routes concerned. The circular contained this clause: "The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to Railroad Mail Service." The claimant signed the circular protesting against certain regulations, and was answered on June 30, 1910, that the department would not enter into contract with any railroad company by which it might be excepted from the operation or effect of any postal laws or regulations and that it must be understood that from the beginning of the contract term named

and during the continuance of the service the company would be "subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of the service." In answer to a reply to this letter it was reiterated that it must be understood that the Company would be "subject, as in the past, to the usual customs and practices in relation to railroad mail service as well as to the conditions stated in my letter" of June 30, 1910. The weighings took place and on September 15, 1910, by a notice approved by the Postmaster General on September 22, the claimant was informed that the compensation for route No. 153010, (the route chiefly concerned), had been fixed from July 1, 1910, to June 30, 1914 "(unless otherwise ordered)" at certain sums, "upon returns showing the amount and character of the service," for the usual time—(ninety working days). The notice added "This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week." This correspondence is relied upon by the claimant as a contract fixing its pay for four years.

In 1906 the claimant had established a fast mail train from Parsons, Kansas, that connected with the Frisco System train No. 3, at Vinita, Oklahoma, with further connections that carried the mail to Houston, Galveston and San Antonio, Texas. It had guaranteed the maintenance of the service until July 1, 1910, and was maintaining it at the time of the readjustment in that year. Its return on the Distance Circular for route No. 153010 showed Vinita as a station where mails were put on and put off trains, and the adjustment showed allowances for mails from Parsons to Vinita and from Vinita to Texas. The claimant gave no notice that the fast train would be discontinued. Early in 1912, however, it was discontinued, the Postoffice Department protesting that it was a violation of contract, and being compelled thereby to

make other provisions for the mails concerned. Thereafter, on November 22, 1912, the Department ordered the mails diverted to other lines to be weighed for twenty-one days beginning on November 26, so far as such mails could be definitely identified, the mail not to be weighed in case of doubt—that provision of course being favorable to the road. The result was an order of February 21, 1913, approved by the Postmaster on March 1, 1913, by which the compensation on route No. 153010 was diminished by $10,914.04 a year, from July 1, 1912, and that of two other routes increased by $6,199.08. The claimant contending that the whole proceeding was illegal sues for the difference between the new and the old allowance for the two years when the new order was enforced.

The Government justifies the Department's course under the arrangement that we have recited, the previously existing law and the Act of August 24, 1912, c. 389, § 4, 37 Stat. 539, 554. "When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other cases, and readjust the compensation on the routes affected accordingly: *Provided*, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: *Provided further*, That readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve." The claimant contends that it had a contract that could not be affected by this statute and that the statute was not followed in what was done.

The contention that the arrangement between the De-

partment and the claimant was a contract that the statute could not affect is sufficiently answered by *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 249 U. S. 385, and *The Mail Divisor Cases*, 251 U. S. 326, coupled with the express notice that the railroad would be "subject to all the postal laws and regulations which are now or may become applicable during the term of the service." Moreover it is an extravagant interpretation of the adjustment to suppose that the railroad could discontinue an important item of the services upon which the compensation was computed, and still demand the same pay.

The construction of the statute also seems to us to be tolerably plain upon the points mainly argued. The effect of the diversion of mails may be ascertained by "a weighing of such mails" (that is, very plainly, the diverted ones) for such number of days as the Postmaster General may determine. This is not a recurrence to the expensive quadrennial weighing for ninety days but a limited investigation for a limited purpose. The result of the last general weighing, which is sufficient to afford a satisfactory basis for payment, is accepted by the statute as a near enough basis for the ten per cent. test that it creates; the object of the test being merely to show that the diversion has been substantial. The ratio fixed had no other importance than to indicate a case for readjustment and was not necessary even for that, as was shown by the repeal of the proviso in a few years. Act of May 18, 1916, c. 126, § 5, 39 Stat. 159, 161.

The statute itself contemplates a readjustment in respect of past services, since it was not approved until August 24, 1912, and allows a readjustment from the first of the previous July. As the change in the pay is made in respect of a change that has occurred in the service by which the current pay was fixed, the railroad suffers no injustice, and, as we have said, by the terms of its arrangement it took the risk of such a statute being passed.

There is an ambiguity in the words "ten per centum on any of the routes affected." The railroad seems to have contended that they required the diverted mails to equal ten per cent. of the average daily weight on all of the routes affected. The Department construed them to mean that it was enough if the diversion amounted to the ten per cent. on any one of the routes. The first interpretation that occurs to a reader may be that the routes are considered separately and that no readjustment shall be made in respect of any route unless the diversion on the route equals ten per cent. But the routes mentioned are supposed to be all affected by the same diversion and therefore are considered collectively. If a readjustment is made as to one route it is reasonable to take into account the offsets on others arising from the same change. That being so there is a literal plausibility in the railroad's contention—but having in mind what we have suggested to be the only purpose of the requirement, we are disposed to accept the construction adopted by the Department and the Court of Claims, that the statute denies a readjustment only if the diverted mails do not equal ten per cent. of the average daily weight upon any, that is, upon some one of the routes. If the proviso had meant them to amount to ten per cent. upon all the routes, "all" not "any" is the word that naturally would have been used.

Judgment affirmed.